S. HRG. 112–460

HELPING HOMEOWNERS HARMED BY FORECLOSURES: ENSURING ACCOUNTABILITY AND TRANSPARENCY IN FORECLOSURE REVIEWS

HEARING

BEFORE THE

SUBCOMMITTEE ON
HOUSING, TRANSPORTATION, AND COMMUNITY DEVELOPMENT

OF THE

COMMITTEE ON
BANKING, HOUSING, AND URBAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

EXAMINING TRANSPARENCY, ACCOUNTABILITY, AND CONSISTENCY IN THE FORECLOSURE REVIEW PROCESS AND THE ONGOING EFFECTS ON HOMEOWNERS AND SERVICERS STEMMING FROM THE FORECLOSURE CRISIS

DECEMBER 13, 2011

Printed for the use of the Committee on Banking, Housing, and Urban Affairs

Available at: http://www.fdsys.gov/

U.S. GOVERNMENT PRINTING OFFICE

74–872 PDF WASHINGTON : 2013

For sale by the Superintendent of Documents, U.S. Government Printing Office
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C O N T E N T S

TUESDAY, DECEMBER 13, 2011

HELPING HOMEOWNERS HARMED BY FORECLOSURES: ENSURING ACCOUNTABILITY AND TRANSPARENCY IN FORECLOSURE REVIEWS

TUESDAY, DECEMBER 13, 2011

U.S. SENATE,
SUBCOMMITTEE ON HOUSING, TRANSPORTATION, AND COMMUNITY DEVELOPMENT,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
Washington, DC.

The Subcommittee met at 2:31 p.m. in room SD–538, Dirksen Senate Office Building, Hon. Robert Menendez, Chairman of the Subcommittee, presiding.

OPENING STATEMENT OF CHAIRMAN ROBERT MENENDEZ

Senator MENENDEZ. Good afternoon. This meeting of the Committee on Banking, Housing, and Urban Affairs Subcommittee on Houston, Transportation, and Community Development will come to order.

Today's hearing is entitled "Helping Homeowners Harmed by Foreclosures: Ensuring Accountability and Transparency in Foreclosure Reviews." This topic is extremely important to our Nation's homeowners, especially those who have been harmed by illegal foreclosure practices. It is of particular concern to the countless New Jersey homeowners who have contacted by my office, almost all with terrible stories about their experiences going through foreclosure, and many with stories of being either mistreated or neglected by their mortgage servicers.

As we attempt to correct for past illegal foreclosures, we must have transparency, consistency, and accountability in the foreclosure review program. If we do not remain committed to transparency, consistency, and accountability, the foreclosure reviews will be toothless.

After being hit hard by the foreclosure crisis and other economic woes, American homeowners expect and deserve a fair review and compensation where appropriate. The success of the foreclosure review program is one of the factors in the recovery of our Nation's housing market.

Transparency, consistency, and accountability in the foreclosure reviews are necessary for the public and policymakers to know that they are being performed fairly. Transparency will ensure that borrowers and the public know who is eligible for relief, what type of relief will be provided, and the results on a bank-by-bank basis.

The public needs full and clear guidelines on what constitutes financial harm to a borrower so that people who are actually harmed do not fall through the cracks. There must also be better guidance from homeowners who are facing imminent foreclosure as to whether their foreclosures will be temporarily halted or not.

And, finally, it is imperative that homeowners, advocates, and counselors have a regular seat at the table and give their input on the process. Many of the counselors have been working with consumers a long time on these issues, and their input is invaluable.

Consistency is critical so that similarly situated borrowers with different servicers and different reviewers receive similar treatment and outcomes. There must be established protocols in place for both the foreclosure reviews and compensation process to ensure that similarly situated borrowers are treated fairly. Also, outreach and materials must be available for people who speak different languages so that they do not miss out on participating in this program.

Accountability will give the public confidence that our bank regulators, the OCC, and the Federal Reserve are fairly and effectively working to protect borrowers' rights and fix harms caused by the banks they regulate. Although the Federal Reserve did not appear today because of the Federal Open Market Committee meeting, they have submitted a statement for the record and will take questions for the record from all Senators.

Senator MENENDEZ. I would note that the Federal Reserve has lagged the OCC in that they have not released their engagement letters yet, and I would urge them, as the Chairman of the Subcommittee, to move along quickly with that.

In terms of accountability, it is also important that the third-party consultants who are making these critical decisions are held accountable for doing these reviews independently of the banks that hire them with the OCC's approval, which is a challenge considering that most of them have done business in some form with the same banks whose work they are now expected to evaluate.

It is also important that banks be held accountable for their results on a bank-by-bank basis with appropriate penalties such as fines. And there must be clear standards on how the OCC and the Fed will conduct oversight over the consultant activities and the actions regulators will take against consultants and servicers if it finds their performance lacking. Moreover, there must be a measurable goal and benchmark for the program so that all parties are publicly accountable.

In closing, let me just say the foreclosure review program could potentially impact about 4.6 million homeowners who are eligible for review. We must begin to fix those unscrupulous lending practices that took place and wrongful foreclosures with the public interest as our core principle. And I look forward to our witnesses today, both Ms. Williams of the Office of the Comptroller of the Currency, as well as all of those on the second panel who will help us come to an understanding of where we are, where we are headed, and what needs to be done.

With that, I am happy to recognize any of my colleagues who may have an opening statement. And if not, let me welcome Ms. Julie Williams, who is the First Senior Deputy Comptroller and

Chief Counsel of the Office of the Comptroller of the Currency. She is responsible for all of the agency's legal activities, including legal advisory services to banks and examiners, enforcement and compliance activities, litigation, legislative initiatives, and regulation of securities and corporate practices of national banks.

Ms. Williams, thank you very much, and we look forward to your testimony.

STATEMENT OF JULIE L. WILLIAMS, FIRST SENIOR DEPUTY COMPTROLLER AND CHIEF COUNSEL, OFFICE OF THE COMPTROLLER OF THE CURRENCY

Ms. WILLIAMS. Thank you. Chairman Menendez and Members of the Subcommittee, I appreciate the opportunity to appear before you this afternoon to provide information on the status of the OCC's implementation of enforcement actions that direct the country's largest mortgage servicers to correct deficient and unsafe or unsound servicing and foreclosure processing practices and to provide remediation to borrowers financially injured by those practices.

The OCC appreciates the Subcommittee's concerns regarding transparency and accountability throughout this process. My written testimony provides up-to-date information describing in detail the independent foreclosure review process required by our enforcement orders and the other required comprehensive corrective actions that are underway. Our goals are clear: Fix what was broken, identify borrowers who were financially harmed, provide compensation for that injury, and make sure this does not happen again.

The work to correct mortgage servicing and foreclosure process defects involves many components. Efforts include: establishing single points of contact to improve communication with borrowers; addressing how to eliminate dual tracking; improving oversight and management of third-party service providers; enhancing operations related to MERS; and improvements in management information systems, risk assessment and management, and compliance oversight.

The OCC has also required the servicers to retain independent consultants to conduct an independent review of each servicer's foreclosure activities spanning 2009 through 2010. The independent review has two parts: first, a claims process whereby borrowers who believe they were financially harmed by defective servicing and foreclosure practices during that period may obtain an independent review of their case; and, second, a file review component.

The most public aspect is the claims process, which was launched on November 1. Since that date, more than 2.7 million letters have been sent to borrowers explaining how they may request an independent review of their case. More than 4 million letters will be sent by the end of the year. To date, less than 5 percent of those letters have been returned as undeliverable, and the independent claims processor is working to identify addresses for those undeliverable letters.

The OCC is requiring servicers to use advertising, a Web site, a toll-free number, and various other forms of outreach to increase awareness and understanding of the review process. Advertising

will kick off at the beginning of next year and will include full-page advertisements in widely read national publications as well as publications that serve minority and underserved audiences. The OCC will monitor the effectiveness of this effort, and additional advertising and outreach may be required.

As of December 9th, the independent foreclosure review Web site had been visited more than 280,000 times, and the toll-free number had answered nearly 49,000 calls. The OCC also will launch a series of public service announcements in January that will include both print and radio spots in English and Spanish. We are working with a number of public interest organizations to explain the foreclosure review process. We are discussing their concerns about the scope and effectiveness of the outreach program and their suggestions for improvements.

In addition to this claims process, our enforcement orders require the independent consultants to perform file reviews of identified segments of borrowers. They are using sampling and other tools to identify files for review subject to guidance and oversight from the OCC. Currently, 56,000 files are under review.

We are requiring 100 percent review of some borrower segments, including cases involving the Servicemembers Civil Relief Act, bankruptcy cases involving foreclosures in 2009 and 2010, cases referred by State or Federal agencies, and reviews requested through the coordinated claims process that I have described.

With respect to SCRA cases, I would like to close by offering particular thanks to the Defense Manpower Data Center of the Department of Defense and to the Department of Justice. We reached out to both to explore how to effectively identify servicemembers whose cases should be reviewed as part of the 100 percent review. And as a result of that collaboration, processes have been developed that will ensure that all eligible servicemembers are identified for inclusion in the 100 percent file review.

Again, I appreciate the opportunity to testify, and I look forward to answering your questions.

Senator MENENDEZ. Well, thank you very much.

Let me start off. You and I had a conversation a few days back, and I just want to follow up on some of the points.

Will the OCC release full guidelines, other than your 20 examples, to the public for what constitutes financial harm to a borrower?

Ms. WILLIAMS. Senator, what we have tried to do in the information that we have released so far, in connection with releasing the engagement letters, is to release what has been developed to date by the OCC and the Fed as examples of types of financial injury that could be covered in providing financial remediation. So to the extent that the OCC and the Fed have developed examples, we have made those available.

If there are other situations that are identified through the process as it goes forward, if there are aspects of clarifications of the examples that we have already made available, that should be put out in order to fully inform the public and potentially affected borrowers that there are other possible examples, I think we are quite open to that.

Senator MENENDEZ. What I do not understand is if you do not release some sense of full guidelines, then how are borrowers supposed to know if what happened to them will qualify for relief or not? Because, obviously, their effort to do this, you know, when they receive these letters, they have to make a determination. There is going to have to be not only effort into it, but obviously in some cases to assist them to do so maybe even resources spent by them to pursue the possibility of relief. And if you are not sure what is the universe, the standard at the end of the day, I get concerned. You know, Ms. Cohen in her testimony that will come up in the second panel cites other examples of harm to borrowers that are not in your 20 examples: servicer delay, the cost of being placed in a proprietary modification instead of a HAMP one, to mention a few. So I am trying to get a sense of why do we not have a broader outline of what is the guideline to understand what financial harm is.

And, second, as a corollary to that, you state in your written testimony that the OCC will provide guidance clarifying compensation for certain categories of harm, but that, "Any such baseline expectations would not, however, override the independent judgment of the independent consultants." And that strikes me as somewhat backwards. Who is running the show—the OCC as the regulator or the third-party consultants and the servicers who hired them? Which, you know, goes to the general concern about the objectivity of those really making the key decisions here.

So why not a more fuller understanding of what is the standard of financial harm? And why not in your providing a baseline of—and guidance clarifying compensation for certain categories of harm, why not say these are, in fact, to be adhered to by the independent consultant?

Ms. WILLIAMS. Well, two separate questions, so let me try to take them in turn.

As I indicated, what we and the Federal Reserve had tried to do at the outset is to identify a number of examples of types of injury. If a borrower feels that they have been harmed, that they have been injured by servicing or foreclosure practices, they can submit a claim and set out whatever type of injury or harm that they think they have suffered. The way that the form is designed is it does try to cluster some specific questions around the categories that were identified by the OCC and the Fed in the injury guidance. But there also is a portion of the form where a borrower can tell their story, can present their story of how they feel they have been harmed.

Interestingly, we have looked at the claims forms that have been submitted so far, and 78 percent of those forms use at least that "Other" category. In many of the forms the borrowers are filling out more than one category on the form, but in 78 percent of those situations, they are also filling out the "Other" part of the form.

So what we want is for the borrower to tell their story about how they feel they have been injured and get that information into the review process with the independent consultants. And we certainly will try—if there are other general areas that we and the Fed think are appropriate for supplemental injury guidance, we are certainly

open to trying to get the message out about those. But the claims process is designed to let borrowers tell their story.

Senator MENENDEZ. And the second part?

Ms. WILLIAMS. The second part, on the types of compensation or remediation, we are in the process of trying to develop guidance—this is a conversation involving the independent consultants as well as the Federal Reserve—so that there is a consistency, a range of consistency, around the types of remediation that would be provided in connection with particular types of financial harm. So you would not have a situation if you were with Servicer X that you would get one type of relief and if you were with Servicer Y you get a very different type of relief or you get a very different dollar amount. But the process also does contemplate that there is the opportunity and the need for the independent consultants to consider the facts that are before them and take those into account. And we also do not want to tell any of the independent consultants, if they feel they want to do better, then any sort of general guidance that the agencies may put out, we would certainly not say anything to try to hold them back.

Senator MENENDEZ. But a baseline does not suggest you cannot do better.

Ms. WILLIAMS. That is correct.

Senator MENENDEZ. But by the same token, a baseline which you then go on to say does not override the independent judgment is not really a baseline.

Ms. WILLIAMS. It is certainly a sense of range to try to encourage consistency in the results that are reached with respect to particular types of injury. We do not want to foreclose that there might not be facts and circumstances that the consultants would find that might produce a variation off of whatever guidance we provide.

Senator MENENDEZ. I have other questions, but let me turn to my colleagues. I have been given a list here from the Committee staff, so in order of appearance, Senator Merkley.

Senator MERKLEY. Thank you very much, Mr. Chair.

I wanted to understand. The letter that families are receiving lists six types of potential harm. Now, you say in your testimony that you have included 20 types of harm to the independent consultants. Why not alert homeowners to the full range? They are not sophisticated analysts of detailed mortgage issues. Why only list 6 of the 20?

Ms. WILLIAMS. The way that the form was designed for those 6, they are more general than the 22 categories that are listed in the joint OCC–Fed guidance. And some might say that the 22 categories listed in the guidance are somewhat technical. So the form was an effort to try to category generalize areas where there could be types of injury. And then, as I mentioned, there is a portion of the form where the borrower can fill in any information the borrower wants to provide about injury.

Senator MERKLEY. Well, I am interested in the fact that 78 percent of the folks use "Other." As you analyze what those other categories are, do you find, oh, there are some themes here of major forms of perceived mistakes that are worth alerting people to, that

these qualify? Or are you finding you look at them and you go, oh, no, these would not qualify?

Ms. WILLIAMS. I personally do not know the details of what has come in in the "Other" category, but that is information that we will be very interested in. I could add just in terms of the breakdown of the categories of the claims, 85 percent of them are providing information with respect to a modification-related type of harm; 63 percent about a mortgage balance error; 47 percent are raising issues about improper or incorrect fees; and 45 percent of what we have so far of the claims forms indicate that the borrower thinks there was inappropriate payment processing.

With those numbers you can tell there is overlap, so the forms are obviously coming in with multiple categories being filled out.

Senator MERKLEY. Why did you all want to keep the independent reviewers secret?

Ms. WILLIAMS. We did not. We made that information publicly available by releasing the engagement letters.

Senator MERKLEY. OK. I had the understanding that you resisted, did not want to release those, and it was only public pressure that you responded to. Is that wrong?

Ms. WILLIAMS. I think our plan had been that we were going to release that information, and that we were going to release the engagement letters. The names would become publicly available with the release of the engagement letters.

Senator MERKLEY. So do you feel like there is some standard that eliminates the conflict of interest between these companies, which are often major companies that may have contracts with all kinds of folks in the banking community? Was there some kind of conflict-of-interest standard applied to actually create something homeowners can count on as an independent, unbiased point of view?

Ms. WILLIAMS. Senator, we did a couple of things in that regard. We screened the independent consultants. We also screened the law firms that each of the independent consultants retained. And what we focused on was trying to identify situations where the independent consultants or the law firms might have previously taken positions relative to the types of issues that they were going to be asked to render an independent judgment on in their role as an independent consultant. And where we felt there was any question about that type of previous role by the independent consultants or the law firms, we disqualified them.

We also required specific language in the engagement letters between the independent consultants and the servicers that the independent consultants not take direction from and are not under the control of the servicers in a number of important respects. The interim report that we released prior to Thanksgiving together with the engagement letters lists seven or eight, I believe, separate requirements that had to be included verbatim in the engagement letters between the independent consultants and the servicers with respect to not being influenced by the servicers in their decision-making process and taking direction and being overseen by the OCC or the Fed.

Senator MERKLEY. I am out of time, so I will just note that I feel I have a broad concern. This feels like a wild goose chase. So many

homeowners were told to make these reduced payments or stop making payments, and then were told you do not qualify for modification because you reduced your payments. Just numerous elements concern me, but I am out of time, so I will defer to my colleagues.

Ms. WILLIAMS. Senator, we are very concerned about that as well, and our objective is to get as many borrowers who believe that they were harmed into this pipeline so that their cases can be reviewed.

Senator MERKLEY. Thank you.

Senator MENENDEZ. Senator Reed.

Senator REED. Who selected the independent consultants?

Ms. WILLIAMS. The independent consultants were initially proposed by each of the servicers, and then they were reviewed and signed off on or nondisapproved by the agency.

Senator REED. Did you reject any of the proposed independent consultants?

Ms. WILLIAMS. I believe we did, and I know that we rejected a number of law firms because I was directly involved in that process.

Senator REED. In terms of the independent consultants, have all of them done previous work or many of them done previous work for the servicers that they are now supervising?

Ms. WILLIAMS. There are a number of situations where they have done previous work for the servicers in different areas generally, but they have had previous business engagements with those servicers.

Senator REED. I think at least appearance-wise it raises questions about the true independence of these organizations and the fact that these entities were proposed to you rather than you, in fact, assigned a truly independent—and I think that is not only perceptual, but is perhaps a substantive floor that is hard to reconcile. Let me ask——

Ms. WILLIAMS. Senator, if I could address that.

Senator REED. Yes, ma'am.

Ms. WILLIAMS. We did have internal discussions about that, the process of retaining the independent consultants and whether it would be feasible for the OCC to retain the consultants, for example, and the difficulty with that is that it put us in a position of having to go through a procurement process that was going to be very time-consuming and raise a lot of difficult questions about what standards were we going to use to evaluate their qualifications under the criteria that we would have to have followed.

So we felt that the independence requirements that we required in the engagement letters helped to solidify the understanding of the responsibilities of the independent consultants.

Senator REED. So you are telling me you did not have the authority to order a servicer to engage a specific independent consultant? You did not have that authority?

Ms. WILLIAMS. To say that they had to hire X firm and pay for——

Senator REED. Exactly, yes.

Ms. WILLIAMS. We would have to figure out what process we would go through in order to determine which one that would be, the qualifications of that——

Senator REED. Wouldn't it be very similar to the process you went through screening the proposed firms that were selected by the company being reviewed?

Ms. WILLIAMS. I think our screening process was based more broadly on this issue of the prior roles of the consultants in connection with the issues that they were going to be asked to opine on and their overall capacity, resources to carry out the——

Senator REED. I think you are saying two things here: that you have done such a thorough screening that you are confident that these independent reviewers are truly independent, yet you could not do that before the fact, you had to rely upon the recommendation of the individual who was being reviewed. Doesn't that sound somewhat discordant in terms of your ability or capacity?

Ms. WILLIAMS. Senator, I do not think it does in terms of our role. One of the other challenges that we faced, quite frankly, is the scope and scale of the firms that had the basic capacity to do this work. We found that many of them had various engagements with most of the servicers involved.

Senator REED. Let me ask you another question. If a firm that has had a previous engagement encounters a situation in which they participated or rendered advice, are they obligated to inform you immediately?

Ms. WILLIAMS. I am not sure if I understand the question, sir.

Senator REED. You have a firm that is now the independent consultant.

Ms. WILLIAMS. Right.

Senator REED. They discover a series of transactions that, in fact, they were directly involved with. Do they have the obligation to inform you immediately——

Ms. WILLIAMS. We would expect that they would inform us.

Senator REED. Do they have the obligation, rather than you have the expectation?

Ms. WILLIAMS. I would say that they have the obligation. The expectation we have is that they would not have had that sort of involvement.

Senator REED. If they find—there is proprietary information engaged here, but if they find proprietary information that is potentially material to investors in terms of the behavior of these servicers, and most of the holding companies that own them are public companies, are they obligated to inform you and the Securities and Exchange Commission of their findings?

Ms. WILLIAMS. Again, I am not sure if I understand the focus of your question. If they, in doing their reviews——

Senator REED. If they are doing their review, find potential criminal activity, potential failure to disclose material facts that would be subject to reporting by the SEC, are they required to inform you and the SEC of their discoveries?

Ms. WILLIAMS. I do not know of their obligations to inform the SEC. I think they would be obligated to inform us——

Senator REED. And you would be obligated to inform the SEC?

Ms. WILLIAMS. We have a good working relationship with the SEC——

Senator REED. I am not talking about a good working relationship. I am talking about if you find material information that was material to investors that had not been disclosed through this process, do you have the option to inform the SEC or not?

Ms. WILLIAMS. No. No, of course not. If we find something we think constitutes a violation of the Federal securities laws, that is the sort of situation where we will work with the SEC.

Senator REED. Thank you. My time has expired.

Senator MENENDEZ. I think there are a lot of questions, and so we are going to go through a second round.

Let me ask you, why has the OCC not publicly released at least nonconfidential parts of the action plans to implement this program as I requested of the OCC and the Fed in July?

Ms. WILLIAMS. Senator, the action plans are quite voluminous. They are, and I have looked at a number of them myself, a mixture of a lot of very detailed functional process information and some summary overview types of statements. They have been submitted to us with assertions that the information is highly sensitive, that it provides competitors with insights into internal risk management methodology and business strategies, with assertions that the information includes trade secrets, operations information, confidential statistical data, other confidential commercial and financial data within the meaning of the Trade Secrets Act, for which there are sanctions for release. So it is very difficult as a practical matter to simply release the whole document without doing a very elaborate review and redaction for that type of information.

If there are particular aspects of the action plans that the Committee is interested in——

Senator MENENDEZ. The Fed states in its testimony that it, quote, "expects to disclose significant portions of the documentation related to the final action plans."

Ms. WILLIAMS. Yes.

Senator MENENDEZ. So why would the Fed be able to do that but the OCC not?

Ms. WILLIAMS. I do not know what process they are going through and they have not done it yet, so all I am saying is that the process of dealing with the issues involved in releasing the action plans is a lot more complicated than the issues with the engagement letters, and I do volunteer to you, Mr. Chairman, if there are particular things that are of interest with respect to the action plans, I think we can try to work with the Subcommittee——

Senator MENENDEZ. Let me go through a few. You know, openness and transparency in this process is going to be critical to a belief that it was done, especially when you have hired independent consulters for which there is—I have concerns, Senator Merkley, I am sure others have concerns about the process. You know, it is going to be critically important to give this any validation at the end of the day. So I would urge you to, in that spirit, be as open and transparent as you can.

Let me ask you a series of questions and I hope you can give me some brief answers. Homeowner advocates allege that homeowners will be required to give up their legal rights to other remedies if

they apply for this program or take any money, even a small amount. Is that accurate?

Ms. WILLIAMS. There has been no decision made that that would happen.

Senator MENENDEZ. OK. There has been no decision made. That does not mean that there could not be a decision made that would say, yes, that will happen.

Ms. WILLIAMS. There could be situations, depending upon the type of relief that ends up being provided, where it may be sensible for a servicer to seek a waiver. So, for example, if the remediation that is provided is the homeowner gets the home back, they get expenses paid and they get some lump sum payment, form of compensation, on top of that, with a package of remediation like that, that may be a situation where a waiver would be appropriate.

Senator MERKLEY. So, in essence—but they would be able to make that decision before they chose to give up their rights?

Ms. WILLIAMS. Absolutely.

Senator MENENDEZ. Second, the consent orders do not end dual track. They perpetuate it, since servicers are still allowed to proceed with foreclosures while they are still reviewing files of homeowners for a modification. Why are we allowing that when that creates such a confusion to homeowners at the end of the day?

Ms. WILLIAMS. Senator, the consent orders provided for a halting of dual tracking when there was an approval of a trial or permanent modification. This was an area, and I apologize here, I am going to give a little longer answer—this was an area where we specifically envisioned that in the event of a global settlement involving the Department of Justice and the State AGs that there would be a term sheet that would be a part of that settlement that has more detailed standards in it that would be incorporated into the action plans of the servicers. We also anticipated that there would be changes made, which now have been made, by the GSEs in their requirements for servicers handling troubled mortgages and that those two would have to be taken into account in the action plans at the end of the day. The combination there results in actually more requirements in stopping dual tracking than the basics that are provided in our consent orders.

Senator MENENDEZ. Let me finally ask, how many people are eligible and how many do you expect to appeal?

Ms. WILLIAMS. For the National Bank and Federal Savings Association population, it is just under four million. The total for all of the servicers covered by the enforcement orders is about four—maybe a little less than four-and-a-half million.

Senator MENENDEZ. And how many do you expect to appeal?

Ms. WILLIAMS. We do not know, sir.

Senator MENENDEZ. And that raises the final question that I am concerned about. If you have no sense of how many are going to appeal, how will you know whether the third-party consultants will have the personnel and the wherewithal to review the cases in a timely manner, especially since dual track is permitted?

Ms. WILLIAMS. What we will be doing through the supervisory process is overseeing and checking the processes that the independent consultants are using. We have also required the independent consultants themselves to have certain quality assurance,

quality control functions, and they will be performing that function themselves and we will check that, too.

Senator MENENDEZ. And if you felt they did not have the sufficient personnel or wherewithal to pursue it, you would have the ability to order them to do that?

Ms. WILLIAMS. To get more people or more resources.

Senator MENENDEZ. Senator Merkley.

Senator MERKLEY. Thank you.

In the letter to homeowners, did you disclose that the independent reviewers were selected by the companies that hold the mortgages?

Ms. WILLIAMS. Senator, I do not believe that is in the letter, but I would have to look at it specifically.

Senator MERKLEY. Do you think that that might be important to whether a homeowner feels like it truly is an independent process?

Ms. WILLIAMS. I can understand the issue that you all are raising, and what I have tried to explain is why we think that we have taken steps to make sure that the process has integrity.

Senator MERKLEY. Do you think the banks would consider it independent if the homeowner groups representing homeowners got to choose the independent reviewer?

Ms. WILLIAMS. Would the banks consider that? I would imagine that they would.

Senator MERKLEY. Well, please, that is so insincere, that the banks would say, yes, the homeowners get to pick the independent reviewer. I mean, absolutely, are you kidding me? You would claim that the banks would do that? If so, why not let the homeowners pick the independent reviewer if you think the banks would agree to that.

Ms. WILLIAMS. If what you are describing——

Senator MERKLEY. I mean, that is just—it is absurd.

Ms. WILLIAMS. If what you are describing is a process where each homeowner could pick the independent consultant for their claim——

Senator MERKLEY. Yes, one—yes.

Ms. WILLIAMS. That simply would not, I think, be feasible to implement——

Senator MERKLEY. Well, it would not be feasible——

Ms. WILLIAMS.——in any reasonable timeframe.

Senator MERKLEY.——but it would not be considered fair by the other party, and I just—I mean, the fact that you have not disclosed—you are talking to the American people here and you are putting your reputation on the line, saying we have established an independent process. You are not disclosing that it is paid for by one party. You are not disclosing that these companies have a relationship already with the party. And you are not disclosing that one side chose the independent. And I think to even call it independent is, in that situation, a complete betrayal of your trust with the homeowner, homeowners who feel like they have been manipulated and pushed so often for so long. So each time I hear you say the word "independent," I am just going to flinch.

Then the letter says, possible compensation or other remedy, partway down the second page. What compensation? What remedy? The homeowner has no sense that there is anything real at the end

of this journey. Why not fill in the homeowner on kind of the types of compensation just so they might feel like maybe this one is not a wild goose chase? Maybe this is real?

Ms. WILLIAMS. And that gets to the guidance discussions that the Chairman was asking me about—what types of financial remediation is expected. Our discussions that are ongoing to develop some consistency and ranges of types of remediation based on types of injury. So the sorts of things that one could envision here are if injury involves the imposition of various fees and charges that were not authorized and were not correct, that there should be reimbursement for that. If someone lost their home as a result of an impermissible foreclosure and the property is still in the foreclosure pipeline and can be returned to the borrower, that that would be a form of financial remediation in that case.

Senator MERKLEY. Are you planning to send a second letter to homeowners to, one, to clarify the way that the independent—so-called independent process has been structured so that homeowners are not misled by their own Government? And second, to fill them in on a list of potential types of compensation so they feel like, well, this is something real?

Ms. WILLIAMS. Senator, what we may do through subsequent communications—and whether that is media or other form of outreach—is try to provide more information about this process. Now, when I say what we may do, there could be subsequent mailings as part of that process. But we do envision, as I mentioned in my testimony, that there will be a substantial amount of additional information explaining the independent foreclosure review that is going to be put out by the independent consultants. And the OCC will be doing PSAs.

Senator MERKLEY. My time is running out, but I just request that you be fully honest and transparent. The last thing homeowners need after so many challenges—I mean, I can tell you that the one person of a major bank has said the biggest challenge they faced, or the biggest mistake they made was in hiring kind of call room capable folks to discuss what are complicated transactions that the call room folks did not understand and that led to a lot of misinformation. They really regretted that they had not hired people with mortgage expertise so that there would be more accurate conversation. And I really appreciated the fact that that was understood.

But if you view this from the point of view of the homeowner, who did receive so much misleading information along the line, and to recognize that servicers have all kinds of different motivations, if you will, than, say, a corner bank that owns a mortgage and there are extra layers of concern and legal issue and communication, it is just the last thing homeowners need is one more process where there is not full and accurate disclosure.

And I will close by echoing the Chair's comment that the failure to stop the foreclosure process while saying that there may be a remedy means that potentially you are saying, yes, we may find after 3 months that you have been unfairly—had your home taken away, but too bad. We let it happen even while the review was underway. I just—that is a continuation of this sense of, really? That is the fair process here, that you are going to consider this issue

while my home is sold and then I will not be able to get it back because it is gone.

Ms. WILLIAMS. Senator——

Senator MERKLEY. It is disturbing.

Ms. WILLIAMS. Two things. We are working on improving the process, the intake process to try to forestall that situation that you were describing. And finally, our goal is to get as many borrowers who think that they were harmed into this process, and I completely appreciate the points you are making about part of the way to do that is for the borrowers to believe that the process is credible. So——

Senator MERKLEY. Thank you. I am on my colleagues' time——

Ms. WILLIAMS.——it is in our interest to try to assure that.

Senator MENENDEZ. Senator Reed.

Senator REED. Following up on this issue of the independence of these consultants, is there any prohibition on future work that these companies can do with the party that they are independently supervising?

Ms. WILLIAMS. No, sir.

Senator REED. Is there any prohibition about contemporary work that they are doing in other fields?

Ms. WILLIAMS. In unrelated areas? No, sir.

Senator REED. Well, yes, but—so, essentially—you know, there is a difficult set of incentives for it to be truly independent, since I think there is the notion that down the road, you would like to continue to work with this enterprise.

Ms. WILLIAMS. One of the circumstances of these independent consultants is that they were not dependent upon the particular servicer here for their business success.

Senator REED. Well, but they have done business in the past. There is no prohibition against doing business in the future. There is not even a contemporary sort of moratorium for a period of time. Is there any obligation for them to report back to the OCC on business engagements after the fact so you could essentially make a judgment of these engagements——

Ms. WILLIAMS. I do not believe there is.

Senator REED. Would that make sense?

Ms. WILLIAMS. I could take that back and we can think about it.

Senator REED. The Servicemembers Civil Relief Act has been on the books since 1940, and I am pleased from what you said, that you are going to have 100 percent review of every—I want to make sure I heard you correctly—of every file involving a servicemember?

Ms. WILLIAMS. That is in scope, yes.

Senator REED. I do not know what "in scope" means. Could you——

Ms. WILLIAMS. A borrower who was involved in any stage of the foreclosure process during the years 2009 and 2010.

Senator REED. And the other aspect of this is that, apparently, since you complimented DOD and others, you had to rely upon the Department of Defense for the information about who was in the service and who was not in the service, suggesting that the servicers had no idea they were dealing with military personnel?

Ms. WILLIAMS. The problem was one of available data in doing these independent reviews. There were two issues in order to be able to facilitate the reviews. One is the timeframe that the servicemember's the active duty information is typically available through the Defense Manpower Data Center and the Web site. The other is that it has been designed for what folks refer to as "pinging," individual names to check to see whether they are active duty.

What was accomplished with DOD and the involvement of the Department of Justice is to be able to do a batch processing and to cover the time period covered by the independent reviews.

Senator REED. Let me ask a final question. Are you confident now that, going forward, servicers will, in fact, know if an individual is subject to the Servicemembers Civil Relief Act going forward?

Ms. WILLIAMS. I am confident that once the steps that we require be implemented are fully implemented, that that is the case, yes, sir.

Senator REED. When is that going to take place?

Ms. WILLIAMS. Some of them should already be in place and others should be implemented through the early part of next year.

Senator REED. Finally, have you reached out to consumer advocates like the National Consumer Law Center, to engage them and participate with them and work with them in terms of designing this program, vetting this program, responding to their criticism?

Ms. WILLIAMS. We have been doing that over the course of the last several weeks very actively and we had some very constructive discussions, that I have been part of, and some good suggestions about some of the elements of the media campaign.

Senator REED. May I ask, why was that not done earlier, when you were designing the program, thinking about how you would structure the selection of independent consultants, how you would screen the consultants, how you would communicate with consumers?

Ms. WILLIAMS. Part of that answer is that some of the activities were activities that were being conducted by the independent consultants, not by us. This is—what I am talking about is interactions that we are having now. The other is that we were initially thinking more in terms of implementation of an enforcement consent order, and so there were various steps that we saw taking place going forward. So we did not engage right at the outset, but we are very engaged now.

Senator REED. Thank you.

Senator MENENDEZ. Thank you.

Well, thank you, Ms. Williams, for your testimony. You are obviously very talented. Your legal skills were well exhibited. Now, I just hope that you will use that talent and those legal skills to address some of the Committee's concerns and take some of the suggestions to heart, and more importantly than to heart, to action, as to action. So with that——

Ms. WILLIAMS. Senator, thank you——

Senator MENENDEZ.——we appreciate your testimony.

Ms. WILLIAMS.——and you have our commitment.

Senator MENENDEZ. Thank you. With that, we appreciate your testimony.

Let me call up the next panel.

Alys Cohen is a staff attorney at the National Consumer Law Center's Washington office where she advocates before Congress and the Federal regulatory agencies on predatory lending and sustainable home ownership issues. We thank her from coming.

David Holland is the executive vice president of Rust Consulting, Inc., which is contractor that does outreach to homeowners for the foreclosure reviews.

Paul Leonard is the Housing Policy Council's vice president of government affairs where he works with HPC member companies on foreclosure prevention. The Housing Policy Council is assisting the 14 mortgage servicers participating in the foreclosure reviews with the communications regarding the implementation of the public outreach effort.

Professor Anthony Sanders is a professor of finance at George Mason University School of Management, and we welcome him back. He has appeared before the Subcommittee many times and imparted his knowledge. He is also a native of Rumson, New Jersey, which makes him an eminent witness.

Ann Kenyon is a partner at Deloitte & Touche, the third-party consultant for servicer JPMorgan Chase.

And Konrad Alt is a managing director at Promontory Financial Group, the third-party consultant for servicers Bank of America, PNC, and Wells Fargo.

So thank you all for joining us. I would ask you each, since this is a rather large panel, but we wanted to get all these diverse views in, to summarize your statement in about 5 minutes. We will have your full statements included in the record, and with that, Ms. Cohen, we will start with you. Turn your microphone on, please.

STATEMENT OF ALYS COHEN, STAFF ATTORNEY, NATIONAL CONSUMER LAW CENTER

Ms. COHEN. Chairman Menendez, Senator Merkley, thank you for inviting me to testify today. I testify here today on behalf of the National Consumer Law Center's low-income clients and on behalf of 20 State and national organizations, including Americans for Financial Reform, who work daily in communities gravely affected by the foreclosure crisis.

I have worked as an attorney in the area of sustainable mortgage lending for almost 15 years and have spent the last 8 at NCLC, providing technical assistance, training, and policy guidance to attorneys, housing counselors, policymakers, and others.

In the face of a foreclosure crisis of unprecedented proportions, the regulatory response has been staggeringly inadequate. The banking agencies' consent orders and foreclosure exams deny homeowners meaningful reviews and redress. The foreclosure reviews are opaque, leave too much control in the hands of the servicers—the firms that created the mess in the first place—and threaten to strip further rights from homeowners. Given the numerous shortcomings and the potential for homeowner injury, we recommend

that the Consumer Financial Protection Bureau take over implementation of the orders.

The CFPB is in a better position to balance the needs of financial institutions with those of homeowners facing foreclosure. The foreclosure reviews repeatedly favor banks over homeowners, giving the servicers another chance to perpetuate abuses unchecked, while hiding behind a fig leaf of reform and accountability. That process cannot be permitted to continue.

To the extent homeowners do participate in the current process, servicers may use the process to strip homeowners of their legal rights. A lump sum does not equal a sustainable loan, and if you waive all your rights, you will have no chance to save your home from foreclosure later. And participating will be difficult because the outreach process is flawed at every turn, including the five-page required form attached to my testimony, which is written at a college reading level.

The form itself steers borrowers to narrow descriptions of harm geared to underestimate the cost of servicer abuses. Borrowers also are not being informed that they will receive a broader review only if they do not specify a type of harm. Homeowners who check off boxes on the form, even if they inaccurately identify the harm they suffered, will only be reviewed for the harms specified.

The failure to provide multi-language access, an electronic submission option, and outreach in communities of color demonstrates a lack of commitment to widespread redress. Even the broader examples of financial injury provided to the consultants by the regulators omit the most common types of financial injury.

For example, servicer delays are widespread and expensive for homeowners. Almost 89 percent of housing counselors in a national survey reported that servicer processing delays are the most common barrier to obtaining a loan modification. In one recent case from Wisconsin, a servicer's 2-year delay in converting a temporary modification to a permanent modification resulted in additional interest charged to the homeowner of nearly $43,000.

In addition, no provision is made for foreseeable consequences of a wrongful foreclosure. Damaged credit scores will increase credit and insurance costs and limit employment and home rental opportunities. The review process and the orders also provide no meaningful limitations on servicer conduct during a foreclosure, even during the consultants' reviews. As a result, homeowners may lose their homes while seeking a review or simply while waiting for a modification.

The failure to provide for a foreclosure stop during a review makes a mockery of any suggestion that the reviews will make homeowners whole or that these steps will stop the abuses from happening again. Reliance on other Government agencies to fix these problems later is an abdication of responsibility, at best.

Moreover, the reviews will be conducted in a vacuum without firsthand input from interviews with homeowners and without systemic input from stakeholders who work with homeowners. After-the-fact feedback on advertising does not on its own constitute meaningful participation in the process.

The OCC's longstanding record in siding with banks over consumers and over States that seek to protect consumers raises seri-

ous questions about whether the agency will promote a process that meets the needs of homeowners. Most recently, the OCC blatantly ignored Congress' directive to cut back on its regulations preempting State laws, instead writing rules with barely a superficial effort to comply with Dodd-Frank.

National servicing standards are still needed. The consent orders in the foreclosure review process provide at best little more than window dressing for business as usual, even though business as usual has left us in the worst foreclosure crisis in our Nation's history.

Thank you for the opportunity to testify, and I would be happy to answer your questions.

Senator MENENDEZ. Thank you.

Mr. Holland.

STATEMENT OF DAVID C. HOLLAND, EXECUTIVE VICE PRESIDENT, RUST CONSULTING, INC.

Mr. HOLLAND. Chairman Menendez and Members of the Subcommittee, good afternoon. My name is David Holland. I am an executive vice president with Rust Consulting. Rust has been engaged by the servicers to administer certain aspects of the consent orders for the Independent Mortgage Foreclosure Borrower Outreach project. Since this program's inception, we have worked closely with each of the key stakeholders—the servicers, the independent consultants, the Office of the Comptroller of the Currency, and the Federal Reserve Board—to ensure that the terms of the consent orders are fully carried out.

In general, Rust is a company that provides project management and administrative services, typically in support of large, complex, and time-sensitive programs. We are typically engaged as a neutral third party with respect to the issues behind the programs we administer. Our clients include both plaintiff and defense law firms, and businesses and Government agencies at the Federal, State, and local levels.

Beginning in June of 2011, we were contacted by several individual servicers regarding our capabilities with respect to this program. Eventually, we were engaged by all 14 servicers to serve as the single administrative provider under the consent orders. Broadly speaking, our responsibilities under the consent orders are to notify borrowers about the program, to answer their questions, to receive complaint forms, and to handle inbound and outbound mail. More specifically, our responsibilities for this project include the following:

We collaborated with the servicers to prepare plans to ensure appropriate staffing across our responsibilities. An example would be staffing our call center with the appropriate number of customer service representatives to meet expected volumes.

We received relevant data comprising the borrower lists from the 14 servicers.

We standardized the formatting of names and addresses and arranged for corrections to be made to addresses through the National Change of Address service. We also performed up-front "skip-tracing" on the last known addresses for certain borrowers as noted by the servicers in their data.

We continue to oversee the printing and mailing of request for review packages to borrowers. The mailing campaign began on November 1 and is scheduled to conclude on December 27. We continue with additional mailings upon request or as better addresses are received.

We have arranged for publication of notices according to a media plan prepared by the parties. These advertisements will begin running in January of 2012.

In addition, Rust established a call center to take incoming calls from borrowers with questions about the program, their eligibility for it, and their options under it. We have been answering calls since November 1st. Borrowers' requests for complaint forms may be placed through the call center, with Rust fulfilling those requests.

In addition, we established an informational Web site to provide basic information about the program to the public.

Borrowers can submit complaint forms by mail. We have established separate P.O. boxes for each servicer.

And upon receipt of a complaint form, we send the borrower an acknowledgement of receipt.

We image, data capture, and forward submitted complaint forms to servicers and the independent consultants.

With mail sent by Rust to borrowers but returned by the U.S. Postal Service as undeliverable, we attempt to find a better address and, whenever possible, re-mail the notices to those new addresses.

We provide comprehensive daily statistical reporting on program activity and service levels to the associated parties, including the servicers, the independent consultants, the OCC, and the FRB.

It is our understanding that Rust may be asked to perform additional related services yet to be determined.

Thank you, and I am happy to answer any questions that you have.

Senator MENENDEZ. Thank you.

Mr. Leonard.

STATEMENT OF PAUL LEONARD, VICE PRESIDENT OF GOVERNMENT AFFAIRS, HOUSING POLICY COUNCIL OF THE FINANCIAL SERVICES ROUNDTABLE

Mr. LEONARD. Thank you, Chairman Menendez, Senator Merkley, and Members of the Subcommittee. My name is Paul Leonard. I am the vice president of government affairs for the Housing Policy Council of the Financial Services Roundtable. Thank you for the opportunity to testify today regarding the independent foreclosure review process, and I will briefly summarize my written testimony.

The goal of the independent review is to assess whether an eligible borrower incurred financial injury and should receive compensation or other remedy due to servicer errors, misrepresentations, or other deficiencies in the foreclosure process on their primary residence in 2009 and 2010. Everyone in this process has the desire to get it right.

It is also important to note that the independent review process is in addition to other ongoing efforts the industry has made and will continue to make to reach and help at-risk homeowners.

There are five important points about the independent foreclosure review process.

First, the reviews are designed to determine if errors in the foreclosure process caused financial injury to borrowers.

Second, the reviews of the borrower information are independent of the servicers and will be overseen and verified by the joint regulators.

Third, the review process includes a robust outreach campaign that includes direct mail, paid advertising, and other steps to reach potential borrowers.

Fourth, it will take some time to receive and complete the actual reviews as the outreach efforts just began on November 1st, and as Mr. Holland testified, the advertising campaign will begin in January.

And, fifth, the information provided to the regulators on the independent foreclosure reviews throughout the process is intended to be comprehensive and complete.

Everyone involved fully appreciates the importance of the process, and we are working to ensure the reviews are conducted as prescribed by the regulators. The 14 servicers working under the guidance of the regulators have worked together to provide a cohesive process to find lapses in the foreclosure process, to correct them and remedy those that caused financial injury to any homeowner.

In this spirit, the servicers have specifically followed the direction within the consent orders. Additionally, they have worked closely with the regulators to create a consistent process for eligible borrowers to be contacted and have an opportunity for a thorough, independent review of their foreclosure case. The servicers have added senior leadership and internal staff to help them with their respective borrowers and support the review process.

While much of the public focus is on the outreach campaign, it is important to note that the independent foreclosure review actually contains two components. The first is the borrower complaint process that enables eligible borrowers who believe they have been financially harmed in the process to request an independent review of their files. At the same time, the required file look-back is happening, and that is a valid statistical sampling of borrower accounts, including, as Senator Reed pointed out, a review of 100 percent of borrowers with certain characteristics, such as those who may have been eligible for protection under the Servicemembers Civil Relief Act.

Industry-wide, the joint regulators have determined that the population eligible for reviews includes about a little over 4 million borrowers. That does not mean that all of these borrowers were financially harmed. However, this is the universe of borrowers eligible for review.

To reach these borrowers, the public education campaign to inform borrowers about the process has been launched. We are assisting with that. It includes direct mail, national paid advertising, and earned media. Servicers are also working with nonprofit groups and consumer advocates about the process to further help borrowers, and we are sharing that input with the regulator.

The independent foreclosure review process is underway. It is unprecedented in nature and requires close coordination among many different entities while maintaining the independence of the review process as a whole.

Ultimately, we believe these collective efforts will help address concerns about the foreclosure process and hopefully increase borrower confidence.

Thank you for the opportunity to speak today, and I am glad to answer any questions.

Senator MENENDEZ. Thank you.

Dr. Sanders.

STATEMENT OF ANTHONY B. SANDERS, PH.D., DISTINGUISHED PROFESSOR OF REAL ESTATE FINANCE, GEORGE MASON UNIVERSITY

Mr. SANDERS. Chairman Menendez, Senator Merkley, and Members of the Subcommittee, thank you for inviting me to testify today. My name is Anthony B. Sanders. I am the Distinguished Professor of Real Estate Finance at George Mason University and senior scholar at the Mercatus Center. I was previously director of asset-backed and mortgage-backed securities research at Deutsche Bank and the co-author of "Securitization," with Andy Davidson, as well as many other housing finance and housing economics publications.

We are all painfully aware that house prices declined precipitously from its peak in 2006–07 resulting in a 32.5 percent decline. Homeowners' equity in real estate fell 53.8 percent from its peak. While house prices are actually increasing in some areas of the country, they continue to fall in Western and Midwest States. According to Zillow, negative equity rose to 28.6 percent of single-family homes with mortgages in the third quarter of 2011. Unemployment and partial unemployment remains horrific at 8.6 percent and 15.6 percent, respectively. And according to the Bureau of Labor Statistics' latest report, 315,000 people dropped out of the labor force while 120,000 nonfarm jobs were created amounting to a net job loss of 200,000.

The combination of a recession, a catastrophic decline in house prices, and continued unemployment levels not seen since the Great Depression has resulted in a staggering number of mortgage delinquencies, defaults, and foreclosures. According to the LPS report, of December 1st, mortgage delinquencies are down nearly 30 percent from the peak while the foreclosure inventory is at an all-time high. As of October 2011, 2.33 million loans are less than 90 days delinquent, 1.76 million loans are 90 days delinquent, and 2.21 million loans are now in foreclosure. This sums up to 6.30 million loans delinquent or in the state of foreclosure as of October. The foreclosures rates are correlated with housing price declines and State unemployment rates. Clearly, the housing market and high unemployment rates are a drag on the economy, and households have responded by reducing debt levels as a percentage of disposable income, whether voluntary or involuntary. It is clear that all parties involved have suffered enormously since this began.

The Office of the Comptroller of the Currency, OCC, has released its Interim Status Report dated November 2011. The report dis-

closes the independent consultants for the review, and there is no reason to believe that these independent consultants will skew or shape their findings in favor of the servicers. Furthermore, given the level of scrutiny on the loan modification process and foreclosures and the lender/servicers' desires to put this process behind them, I am confident that all parties will handle the review process accurately. And with so many regulatory eyes on the foreclosure process, including this Committee, I find it hard to believe that this process will be anything but transparent. When we include the recent Bloomberg Freedom of Information Act request against the Federal Reserve, which disclosed some information we were unaware of, I think this will be a continuing trend in the market, so I am more comforted that this will be a smooth process.

My concern is not with the selection of the independent consultants, but with the time and costs involved in such a laborious review process relative to the expected economic assessment of harm.

In addition to reviewing foreclosures at the request of the borrower—it is a good idea—and certain mandatory groups, there will also be a sampling of foreclosures to detect problems. Let us suppose that the 4.5 million eligible are reviewed at a cost of $2,500 per review. That would result in a cost to servicers of $11.25 billion. So depending on the number of borrowers that ask for a "free review" and the sampling size for all foreclosures, this process could be quite costly to the lenders and servicers involved.

More importantly, what would be the penalties for harm done to borrowers relative to the cost? There will likely be egregious errors, such as violations of the law including foreclosure on active military personnel, but I would be surprised if these exceed 100 instances, or less than two-tenths of 1 percent of the 4.5 million foreclosures. In terms of modification errors, there are likely to be less than or near 50,000 instances. In terms of technical errors, such as robo-signing, it is difficult forecast how many there will be, but technical errors like robo-signing should not result in any financial harm to borrowers since they likely would have been foreclosed upon after the documentation error was corrected.

So what we are doing is we are comparing a very large number of costs potentially to damages that might amount to approximately $1 billion. Again, any negative or any harm to borrowers, of course, should be correct. But once the review is completed and the remediation for financial harm is concluded, I urge everyone to try to put the foreclosure issue behind us, whether it is uniform servicing standards or whatever process we want to undertake, and try to let the market and the economy heal itself.

Thank you for the opportunity to testify before you today.

Senator MENENDEZ. Thank you.

Ms. Kenyon.

STATEMENT OF ANN M. KENYON, PARTNER, DELOITTE & TOUCHE LLP

Ms. KENYON. Chairman Menendez, Senator Merkley, good afternoon. My name is Ann Kenyon, and I lead the Securitization Advisory Group at Deloitte & Touche LLP. My experience for over 30 years has been in accounting and finance in both industry and public accounting. Since joining Deloitte in 1997, I have led or worked

on many engagements for financial institutions, commercial clients, and governmental entities with respect to their issues in dealing with the capital markets.

Deloitte & Touche LLP and its affiliates have over 45,000 people in offices throughout the United States and perform professional services in four key areas: audit, financial advisory, tax, and consulting.

In your invitation, you asked me to discuss the consent orders that were reached by the OCC last spring with the major mortgage servicers and the foreclosure reviews that will result from them. Article VII of the OCC Consent Order creates a foreclosure review process for borrowers with residential mortgages referred to foreclosure during 2009 and 2010.

As contemplated by the consent order, the objective of the review is to identify borrowers who have suffered direct financial injury as a result in any deficiencies identified in the servicer's procedures in certain areas. Article VII calls for the Bank to retain an independent consultant to conduct "an independent review of certain residential foreclosure actions regarding individual borrowers with respect to the Bank's mortgage servicing portfolio." Deloitte serves as the independent consultant for JPMorgan Chase Bank, and I am the engagement partner on that matter. As required by Article VII, the conduct of the review is subject to the monitoring, oversight, and direction of the OCC. We have been and are meeting with the OCC regularly to keep the OCC officials apprised of the details of our approach and progress.

Deloitte's engagement consists of three stages. In the first stage, Deloitte undertook the planning and coordination necessary to conduct an effective foreclosure file review as described in the consent order. The specific procedures to be performed by Deloitte were approved by the OCC and established based on the requirements of the consent order and discussions with independent counsel.

As a public accounting firm, we do not practice law, so we are guided by independent counsel, retained solely to advise Deloitte in all matters requiring legal interpretation. These procedures are generally described in Appendix E to our engagement letter.

The second stage focuses on testing of the selected foreclosure files. To execute this task, we have deployed file testing teams to review applicable foreclosure files as a basis for making appropriate recommendations for further actions. File analysts will be assigned a file workload to execute against the procedures in Appendix E. The analysts will conduct necessary research and will obtain additional information as necessary for each to form a sufficient basis of conclusion with respect to the results of the procedures performed. Finally, the analysts will recommend a file for further review, for possible remediation activity or closure. Throughout the process, the analysts will document the research, recommendations, and basis for conclusions, and if the analyst recommends a case for further review or possible remediation activity, the basis for the recommendation will be documented and reported to engagement leadership. In addition, Deloitte will conduct quality assurance procedures on the work performed by our team.

Finally, the third stage consists of the review, approval, and issuance of the results of the foreclosure file testing. Among other

tasks, a written report will be prepared by Deloitte and submitted to the OCC detailing the process, testing methodology followed, and results of the procedures performed by Deloitte in the review.

Our engagement letter was approved by the OCC in September, and our work is well underway. As outlined in our engagement letter, we anticipate delivery in late 2012 of the final report based on the review.

I assure you that we at Deloitte take our responsibilities as an independent consultant very seriously. We are working hard to complete the foreclosure review in a timely and effective manner so that the results of our work can be reported to the OCC as promptly as possible. I am satisfied with our progress to date, and I am confident in the quality of the work performed. However, there is much more to be accomplished.

I thank you for providing me with this opportunity to testify and would be happy to answer any questions you have.

Senator MENENDEZ. Thank you.

Mr. Alt.

STATEMENT OF KONRAD ALT, MANAGING DIRECTOR, PROMONTORY FINANCIAL GROUP, LLC

Mr. ALT. Good afternoon, Mr. Chairman, Senator Merkley. My name is Konrad Alt, and since 2004 I have been a managing director of the Promontory Financial Group, responsible for our San Francisco office. Many years ago, though, I was counsel to the Senate Banking Committee, and I am honored to be back here again today.

The independent foreclosure review is not the only piece but I hope it will be an important piece of our country's efforts to address the foreclosure crisis. Our country cannot recover from this crisis until distressed homeowners and former homeowners who have been injured by errors in the foreclosure process receive the remediation they deserve. I want to commend you, Mr. Chairman, for your leadership in addressing this most serious foreclosure issue and for advancing transparency in regard to the foreclosure review.

My comments here today are my own and those of my firm. They do not necessarily reflect the views of any of the financial institutions with which Promontory is working, nor those of other independent consultants

As you know, the consent orders issued by the three Federal bank regulatory agencies last April direct each servicer to retain an independent consultant to conduct a foreclosure review of certain residential foreclosures for the purpose of finding borrowers who incurred financial injury as a result of errors, misrepresentations, or other deficiencies in the foreclosure process, so that they can receive appropriate remediation.

Early in 2011, several of the servicers that received these orders approached Promontory about our willingness and capacity to perform the required independent review. Three of them ultimately proposed to the OCC to engage us. In reviewing their proposals, the agency requested and we provided exhaustive information concerning our credentials and potential conflicts of interest. After considering that information, the agency approved all three engage-

ments, and as a result I now head one of our firm's review teams and help to coordinate Promontory's work in this area.

Given the millions of consumers involved, this undertaking is complex by its very nature. Many things can go wrong with a mortgage or a foreclosure, and reviewing a particular file to ascertain what, if anything, did go wrong can be both difficult and time-consuming. Yet an overly protracted review is not helpful to borrowers who have suffered or are at risk of suffering genuine financial injuries. My colleagues and I want you to know that we are working hard to do this job as fairly and effectively as possible, to the highest professional standards, and that every aspect of our work, from design to implementation to results, is fully transparent to the agencies and subject to agency examination and criticism.

Following approval of our retention, Promontory began to develop a methodology to meet the challenges presented by the foreclosure review. We developed that methodology in close consultation with regulatory examiners and subject matter experts, and adapted it to the particular circumstances of the different servicers with which we are working. We detailed it in engagement letters that the regulators reviewed and commented on before authorizing their execution in September.

Our engagement letters, all of which the OCC has published in redacted form on its Web site, make clear that Promontory works at the agency's direction. Promontory, not the servicers, determines what information to review and whether financial injury has occurred.

Our engagement letters describe a two-pronged approach to the foreclosure review. The first prong consists of a meticulous review of a large number of files. We selected a large portion of these files based on known risk factors—for example, the commencement of foreclosure proceedings after the issuance of a stay in bankruptcy—and the remainder according to well-established statistical methods.

Consistent with the requirements of the consent orders, we review each of the selected files with an eye to numerous specific questions relating to compliance with applicable State and Federal laws, the reasonableness of fees and penalties, and the accuracy of servicer processing of borrower requests for loan modifications. Thus far, we have been seeking to gain a comprehensive and statistically rigorous understanding of the file characteristics associated with financial injury. Depending on what we learn, we may undertake further review of file population segments based on those characteristics. This could potentially lead us to review tens or even hundreds of thousands of additional files.

The second prong of our approach to the foreclosure review is an outreach effort, intended to afford every in-scope borrower an opportunity to request an independent review of his or her foreclosure file. Through a combination of direct mail, advertising, and free media, we are trying to let all in-scope borrowers know about the review opportunity and encourage those who believe they may have been injured to request a review. This outreach launched on November 1st and is now ongoing.

The file review and outreach efforts each have strengths and weaknesses, but in combination they represent a powerful ap-

proach to accomplishing the objectives of the foreclosure review. If we miss any borrowers who have been financially injured in our file review effort, those borrowers still have the opportunity to bring themselves to our attention through the outreach effort. Conversely, if the outreach effort fails to reach portions of the borrower population who have been injured, we should learn about that through the file review process and be able to take additional steps as appropriate.

The logistics of these reviews are formidable. My team includes many former bank examiners, attorneys, and other professionals with relevant subject matter expertise. We have also retained our own counsel, independent of the servicer, to assist with issues of legal interpretation. Like Promontory, our counsel faced careful review of credentials and conflicts.

Quality control and quality assurance are integral to the success of our review, and we have taken care to build them into the design and execution of both the file review and outreach efforts. We conduct a mandatory training program for each reviewer and rigorously monitor the quality of their work.

Mr. Chairman, our redacted engagement letters provide considerable additional detail concerning our approach to this assignment. We are proud to contribute what we can to the solution. We will do our part to the best of our individual and collective ability.

I will be pleased to try to answer any questions you or your colleagues may have for me.

Senator MENENDEZ. Well, thank you all for your testimony. There is a lot of ground to cover here so let me start.

Mr. Alt, who is your client here?

Mr. ALT. We work at the direction of the OCC, sir.

Senator MENENDEZ. So who do you consider your client?

Mr. ALT. I consider my client the OCC.

Senator MENENDEZ. OK. And who is your fiduciary responsibility to?

Mr. ALT. We take our direction from the OCC. We are fully transparent to the OCC. That is to whom we owe our duty. We are, in effect, an extension of the agency.

Senator MENENDEZ. And who pays you?

Mr. ALT. The servicers pay us.

Senator MENENDEZ. When the servicers came to you, what did they ask you to do? When they were considering you as the entity to represent them, what did they ask you to do?

Mr. ALT. They had questions about our expertise. They had questions about our capacity, about whether this was an assignment we were willing to take on. We had discussions about that. It was a fairly standard interview process.

Senator MENENDEZ. Ms. Kenyon, who is your client?

Ms. KENYON. Our contractual arrangement is with JPMorgan Chase. We work at the direction of the OCC.

Senator MENENDEZ. So you consider your client JPMorgan?

Ms. KENYON. We are—we consider that we are responsible to all of the stakeholders in this process, but our contractual arrangement is with JPMorgan Chase.

Senator MENENDEZ. Mm-hmm. Who is your fiduciary responsibility to?

Ms. KENYON. I am sorry, Senator?

Senator MENENDEZ. Who is your fiduciary responsibility to?

Ms. KENYON. To be clear, my understanding is that Deloitte has a responsibility to work at the direction of the OCC and that Deloitte's work serves an important function for the benefit of borrowers and the public. I am, however, not a lawyer and have been advised that as an independent consultant Deloitte does not stand in a fiduciary relationship to any party.

Senator MENENDEZ. So when your client—or, yes, you said it is your client—when your client, JPMorgan Chase, came to you and they could have chosen anybody, what did they ask you in terms of their interest in your representation?

Ms. KENYON. When they approached us, they asked us if we were interested in doing the work, if we felt that we had the expertise in doing the work, if we had the resources to do the work, and that was the extent of the conversation.

Senator MENENDEZ. To either you or Mr. Alt, when they came to you, did they suggest that they would love to try to limit the universe of their exposure?

Mr. ALT. No, sir.

Senator MENENDEZ. You need to give me a verbal response for the record.

Mr. ALT. Mr. Chairman, there was no suggestion of that.

Ms. KENYON. Mr. Chairman, the bank is very mindful of the limitations and the representations in our redacted engagement letter and has behaved accordingly.

Senator MENENDEZ. Let me ask you, Mr. Holland, you know, homeowner advocates have raised concerns about the complaint form being sent to millions of borrowers looking unofficial. Some suggest it looks like a scam. There is no logo. There is dense language that many will not understand. I personally went to the Web site, which looks very unofficial to me, as well. You state in your testimony that the servicers played a role in both developing and even approving the complaint form and Web site, which raises concerns about whether they were poorly designed with the intention of not having as many homeowners respond to the mailings and appealing. Why were servicers involved in developing these forms to begin with?

Mr. HOLLAND. Again, our position in this program is that of a neutral, which is consistent with most of the work that we do. I look at the key stakeholders as the independent consultants, the OCC, Federal Reserve Board, and the servicers, and the engagement, I guess if you will, by the parties was such that they collaborated and instructed us what to do. We were given essentially the format of the forms that were supposed to be printed and mailed.

Senator MENENDEZ. So you, in essence, just played the role of a processor.

Mr. HOLLAND. Third-party vendor, processor, yes.

Senator MENENDEZ. So, in essence, you delivered the forms as the servicers presented them to you?

Mr. HOLLAND. Yes, that is correct.

Senator MENENDEZ. The servicers are the ones who constructed these forms, which makes me concerned about whether or not the interest was to make it as clear and as useful as possible to achieve

the goal of informing significantly and in a way that would be helpful to those who might have been injured that there is a potential relief here versus doing it in such a way that would limit that.

Mr. Leonard, let me ask you—you represent the trade organization here—how is it that—do you not think it is a little bit conflicting for the servicers to have devised what it is that they were going to send out to everybody who potentially could have a claim against them?

Mr. LEONARD. Mr. Chairman, as you know, this entire—the independent review process is part of consent agreements that these 14 individual companies signed with their regulator. So the entire process was developed with the oversight of the OCC and the Federal Reserve. So the servicers are not directing the process, but they are part of the process.

Senator MENENDEZ. Well, but if they devised the form and that is the form that was sent, would you not say they were pretty much in control of that?

Mr. LEONARD. No, because the OCC, the Fed, the independent reviewers, it was a collaborative process, but the servicers did not make the final——

Senator MENENDEZ. Did the servicers submit those forms for approval to the OCC, to your knowledge?

Mr. LEONARD. I would have to go back and get an answer on what the exact step-by-step process was, but the entire process was overseen by the regulator.

Senator MENENDEZ. Are you, either one of you, Ms. Kenyon or Mr. Alt, have knowledge about whether or not the servicers received——

Mr. ALT. The form in several drafts was submitted to the OCC and the Federal Reserve and the final form reflects considerable input from both agencies.

Senator MENENDEZ. OK. So to the extent, then, that we have a problem with the nature of the information to the public, you would say to me that it goes back to the OCC?

Mr. ALT. I would say that, at the end of the day, the agencies are responsible for approving the form and the form reflects their approval.

Senator MENENDEZ. Now, can both—Ms. Kenyon, can you and Mr. Alt tell me unequivocally that your companies are in no way, shape, or form in any way affected by the fact that you have or may have additional work unrelated to this particular contract with the entities that you are ultimately doing the independent consultancy for, that that does not affect people's judgment in any way?

Mr. ALT. Mr. Chairman, speaking for my company, we feel very strongly that we are independent and we are trying, and we believe are succeeding, in conducting ourselves with a high standard of independence. Indeed, we feel that our entire business model depends heavily on our ability to conduct ourselves independently, not only in this engagement, but in very many of our engagements.

Senator MENENDEZ. And you have no concern that should you, in a vigorous pursuit of this, according to what you believe the OCC's mandate is to you, that Bank of America, PNC, or Wells Fargo might not hire your firm in the future?

Mr. ALT. Mr. Chairman, our business model is focused very much on helping financial institutions understand and resolve regulatory issues, and we are successful with that business model in part because of the credibility we enjoy among regulators around the world. And we have that credibility, in part, because of the independence that we maintain and our track record of being willing to prescribe strong medicine when it is needed. If we were to fall short of that standard in this engagement, it would be fundamentally detrimental to our long-term success.

Senator MENENDEZ. Ms. Kenyon, I have the same set of questions for you.

Ms. KENYON. Yes, sir. When we attended a meeting in May with the interagency regulators, it became very apparent to us that independence was very, very critical. We have agreed with the bank that, in fact, we would not accept any further engagements within the home lending area. The process that we have set up to ensure that is if any proposal comes to Deloitte, the partner that is responsible for the overall relationship for JPMorgan Chase is notified. He also notifies me, and we have, in fact, turned down engagements that have come through so that we do not——

Senator MENENDEZ. In the home lending field?

Ms. KENYON. In home lending.

Senator MENENDEZ. Now, but that does not preclude Deloitte from taking other opportunities from JPMorgan having nothing to do with the home lending field?

Ms. KENYON. If there is any doubt on the proprietary of us accepting any engagement, we clear that with the bank.

Senator MENENDEZ. Mm-hmm. And you are not concerned that—your company is not concerned that your vigorous pursuit of what the OCC's mandate here may cause them not to have the favor of JPMorgan in the future as it relates to other non-home ownership issues?

Ms. KENYON. We are very, very mindful of our mandate to maintain independence in this review, and any type of other engagement that we would take would have nothing to do with this engagement or with the matters under the subject area.

Senator MENENDEZ. Senator Merkley.

Senator MERKLEY. Well, thank you, Mr. Chair.

I think there is both a substantive concern about conflicts of interest. There is also a perception issue related to these questions. Mr. Alt, you noted that when Promontory was involved in these discussions with the OCC, that you submitted a list of potential conflicts of interest. Is that a list that you are willing to make public in terms of the parties having full transparency about concerns about conflict of interest?

Mr. ALT. Senator, we provided that list to the OCC and I believe, if I recall correctly, the same list appears in our engagement letter and has been redacted by the OCC. I cannot provide it to you, but I think you should take that up with the OCC.

Senator MERKLEY. But you would be willing to provide it and make that public?

Mr. ALT. I would have to consult with our counsel and make sure that there are not issues. There could be issues relating to other confidential matters and supervisory privilege having to do with

some of our previous engagements that would need to be worked through.

Senator MERKLEY. Mr. Alt, I want to ask you to step outside of the issue of independence to the appearance of independence. As you noted, you are an expert in the independent advice category. That is the business model. If you personally were involved in an issue with a firm, if you were involved in a contest over how a transaction went down and the other side chose the adjudicator, paid the adjudicator, designed the process, designed the form, would you consider that to have the full appearance of independence?

Mr. ALT. Senator, I would agree with you that it raises concerns. It raises questions on its face. But I would also say, in my experience, that independence is about practice and not just about appearance and I think it is important to drill down below the level of appearance, and understand how the relationship works in fact. But I agree with you. It is an issue that is well worth your time to explore.

Senator MERKLEY. Thank you. I appreciate that, because you all are bringing huge amounts of expertise which are really necessary to get this job done. I would probably have preferred that the OCC choose the auditor so that—in each case, the independent reviewer, so that there is a third party choosing the reviewer rather than one party to the conflict. I think it would send a clear message of independence.

I want to turn, Professor, to a comment you make in your testimony, in your written testimony but you also gave in your verbal testimony, that technical errors like robo-signing should not result in any financial harm to borrowers since they would be foreclosed upon after the documentation error is corrected. Is it your sense, then, that in this process, when a robo-signing error is raised or discovered, that there would not be any sort of financial compensation to the party that was incorrectly foreclosed on?

Mr. SANDERS. Well, my point I was trying to make was that if they were supposed to be foreclosed upon anyway, that is, they defaulted on the note and then they went through, received the robo-signing thing, were foreclosed upon, and it turns out they can show documentation that they had the right to foreclose upon them, then what would be the loss to the homeowner if they were foreclosed upon anyway?

Senator MERKLEY. Well, I can tell you that in my State, if the law requires a party that initiates a foreclosure to have ownership of the mortgage and that that was not followed, that is a pretty significant legal breach.

But let me turn to Ms. Kenyon and ask, is it your sense that if there is a robo-signing issue, that there will not be any sort of financial compensation to a homeowner who was put out of their home in a process that was, if you will, not fully legal?

Ms. KENYON. I am sorry, Senator. I could not hear your question.

Senator MERKLEY. Do you agree with the Professor that a robo-signing mistake should not involve any financial consequences?

Ms. KENYON. I believe that when we have put together the remediation construct, we are looking—we are mindful and instructed to look for direct instances of financial harm. So to the degree that

the deficiency led to direct financial harm, then we will make remediation appropriately.

Senator MERKLEY. I do not think that quite answered the question, and let me put it, if you were in a home that was illegally foreclosed on, you would say, well, I was thrown out of my home in an incorrect process. But is your evaluation now as a company saying that person did not suffer any financial harm and should not be compensated? That is your approach to this in terms of the impact on the family?

Ms. KENYON. The objective of the review is to identify borrowers who have suffered direct financial injury as a result of the deficiencies——

Senator MERKLEY. Is getting thrown out of your home through an illegal process direct financial injury in terms of the way you have been instructed to approach this issue?

Ms. KENYON. If, based on counsel, the borrower is removed from his home illegally, then there would be possible financial injury into that construct.

Senator MERKLEY. How would you calculate that injury? Based on what?

Ms. KENYON. We have discussed several different ways of calculating that injury. There are many competing views on that, and the construct is under approval—the construct is under consideration for the OCC.

Senator MERKLEY. OK. And Mr. Alt, do you share the Professor's view that a robo-signing error does not involve any financial harm?

Mr. ALT. The robo-signing scenario is one of the scenarios in which the OCC and the Fed have indicated that harm could arise. Whether it arises, in fact, is going to be a question that is probably determined by reference to other circumstances in the file.

Senator MERKLEY. So if a family is put out of their home illegally, maybe their rent that they are paying is no more than their mortgage payment was, is that a basis you would say they suffered no financial harm? I am trying to get a sense of what really—I mean, or is it just kind of, well, no, their rent is less than their mortgage was, so there is no financial harm. It was an illegal process. They were put out of their home by mistake, but there is no harm so there is no compensation.

Mr. ALT. Well, Senator, I think that you are getting at some of the nuances that need to be taken into account in trying to reach a determination of whether harm has occurred. I think, as Ms. Kenyon has alluded to, we are waiting for guidance from the OCC. All of the independent consultants are waiting for guidance from the OCC and the Federal Reserve that will help all of us understand, we hope, how to evaluate harm and what sort of remediation is appropriate in situations of exactly this type.

Senator MERKLEY. Will the details on those analyses be conveyed to homeowners so they can evaluate whether they should spend the time pursuing this process? In other words, are we saying to homeowners, here is another wild goose chase. You are not going to get compensated for a robo-signing mistake, so do not even ask unless you can show you were thrown into a homeless shelter and were robbed or something of that nature. Or are people just going to apply thinking that they are now getting a third-party compensa-

tion for harm knowing that the harm to their family of illegally being thrown out of their house was huge distress, maybe a divorce, the children had to change schools, they are in complete disarray. Should a person even bother responding to this form without the sort of information about whether there is actually an intention to compensate for the challenges that they faced?

Mr. ALT. My colleagues and I are very committed to trying to find financial injury where it has occurred so that people can receive appropriate remediation. We believe that is important work, and I hope very much that this process will not prove to be a wild goose chase for people that have been injured in that way.

Senator MERKLEY. Thank you.

Senator MENENDEZ. Thank you.

I just have one or two other questions and then we will let you all go.

I have read some questionable job ads that have appeared and I wonder about the qualifications of some of those who are being hired to do these interviews, not interviews, these reviews. So can you tell me what steps you have taken to have the right people conduct these reviews? What is the background, the expertise of people conducting these reviews so that all of us up here in judgment of whether or not this is a process that ultimately there can be confidence in can feel that we have got the right people with the right backgrounds doing the review that for many people may be the single most important decision made in their life?

Mr. ALT. Senator, our projects have hundreds of people working on them, and they work in a wide range of capacities and those capacities require a wide range of skills and backgrounds. And some of those jobs are truly clerical and require little or no experience of any kind and others require many years of subject matter expertise. They may require advanced professional degrees——

Senator MENENDEZ. I understand there is a whole team, but let me maybe hone in on my question.

Mr. ALT. Please.

Senator MENENDEZ. So I file an appeal and now my case is, because it was one of your people who—one of the companies on which you are providing the independent consulting on, and it now goes to someone. I am not talking about the clerical staff who puts the paperwork together. I am talking about what is the qualification of the core individuals sitting in judgment as to whether I have a valid claim.

Mr. ALT. So in our approach, we have a pyramidal structure, as you would find in many organizations, and at the lower level, you would typically find people that will have had some experience in some facet of the mortgage business, and they will have gone through a mandatory training program and their work at the lowest level will be guided by assistance——

Senator MENENDEZ. How long is that mandatory training program?

Mr. ALT. It is a week of classroom training and then a week with somebody sitting beside you and helping you understand how to operate our system and apply the rules. And their work will be overseen by multiple levels of people with, as a general rule, progressively higher amounts of experience in subject matters, which

means there is a very active quality control and quality assurance program because we want to make sure that we get it right.

Senator MENENDEZ. So the core of the individual making this judgment is someone who has some background in the mortgage business and has got 2 weeks of training?

Mr. ALT. Senator, that is a characterization of the very lowest level of our organization, but you should not have the view that that is who is doing all the work. All of that work is——

Senator MENENDEZ. Could you submit to the Committee what the structure is?

Mr. ALT. It is described in the engagement letter that has been made public.

Senator MENENDEZ. The entire structure that you are referring to?

Mr. ALT. Yes, Senator.

Senator MENENDEZ. And who is engaged at those different levels of the structure?

Mr. ALT. I will have to go back and refresh. I am not sure whether our engagement letter——

Senator MENENDEZ. OK. Well, that would be important, because just knowing the structure without knowing who is actually reviewing my file——

Mr. ALT. Fully understood.

Senator MENENDEZ.——is important.

Mr. ALT. Senator, I should also have mentioned that we have, in addition to the file review pyramid that I described, we also have a separate quality assurance group which is composed exclusively of experienced subject matter experts, and they randomly sample all of the work. They report directly to me. And in that way, we keep very tight control over the quality of the work that we are doing——

Senator MENENDEZ. Ms. Kenyon, what is your process?

Ms. KENYON. Senator, we have not hired externally for this project. We have staffed it solely with Deloitte resources to this point. When we look for resources, we, especially at the senior levels, we have identified people with prior mortgage banking experience, experience in controls and procedures work, people who have backgrounds and familiarity with financial institutions and processes as well as experience dealing with financial assets.

When our staff comes on board, we subject them to a 3-week training process, again, similar to Mr. Alt's structure, and I also described in my testimony, we have segregated and organized our group into teams. The more junior resources execute the procedures. There are managers and senior managers who review those executed procedures. And in addition, I have organized a very large partner group to oversee specific subject areas.

Senator MENENDEZ. So it is the same question I asked Mr. Alt. So at the core, who is reviewing my file? I filed an appeal. Who is reviewing my file? Forgetting about the clerical universe that puts the paperwork together, who is reviewing my file? Give me the essence of that person's background.

Ms. KENYON. That is a lower level resource who has had training and is given specific——

Senator MENENDEZ. What is the period of time of that training?

Ms. KENYON. At least 3 weeks for this very specific project in the procedures that we have crafted. And then that work is reviewed by two levels of staff and then it goes through our quality assurance process. It is overseen generally by a partner, as well.

Senator MENENDEZ. And when you say it is overseen by two levels of staff, first of all, what is the nature of that staff that reviews it and what is the extent of their review? Is that a checklist? What is the extent of their review?

Ms. KENYON. The extent of their review is that they will take a specific number of files, look at the procedures that are performed, look in particular for any apparent exceptions that have been found, and double-check the quality of the work.

Senator MENENDEZ. Let me ask you both, is there going to be any direct borrower contact between your operation and the homeowners? Or is it whatever they submit, that is the end all and be all?

Mr. ALT. We do not anticipate any direct borrower contact at this time.

Senator MENENDEZ. OK. So how is it—is that the same with you?

Ms. KENYON. That is correct.

Senator MENENDEZ. So how is it possible to fully evaluate a homeowner's claim fairly without communicating with the homeowner, particularly if proof of their claims, you know, they may have not known how to substantiate their claims? They may have made a very valid claim and you may be looking for substantiation of that claim, especially for homeowners who do not have a counselor or an attorney to guide them through the process and do not really know what the proof is. How do you—how are you going to make that judgment? Is the judgment going to be, well, I read their narrative and there is nothing to back up their narrative, so, therefore, sorry, we do not think you qualify?

Mr. ALT. If it is our view that more information is necessary in order to understand the complaint that is being made, we have the ability to direct the servicer to request that information from the homeowner, or former homeowner.

Ms. KENYON. The same is similar for us, Senator. The other thing that I would point out is when the homeowner makes a claim, we are comparing the claim against the processes and procedures that we have developed for the foreclosure file review. So, in effect, we are reviewing the bank's determination the first time around. If there is need for additional information, then again, as we said, we will work through the appropriate parties to get that.

Senator MENENDEZ. Do you envision yourself frequently asking the servicers to get additional information?

Mr. ALT. I do not yet know the answer to that, Senator. The process is fairly recently launched, and at this point, we are still waiting for many of the files.

Senator MENENDEZ. Having listened to Ms. Williams describe that the overwhelming universe that responded, responded in a narrative form about what they thought was happening to them, I thought very much that they provided all of the substantial information to back up that narrative, and without that, it is very difficult to judge their claim, it would seem to me, because if you take the claim and if the claim through the narrative might lead to the

belief that, yes, there is a possibility, but I do not see the back-up for this, then it would almost be impossible to judge that claim without getting additional information, which means engaging the servicers.

Mr. ALT. I think you raise a real possibility, Senator, and you could very well be right, but we will have to see.

Senator MENENDEZ. Let me ask you, housing counselors have been at this a long time, and unlike some of you who in this particular case, not in terms of your companies and its expertise, but in this particular exercise are fairly new to it and could use that perspective and information, what provisions are being made by you to work with housing counselors who are assisting borrowers? Is there any?

Mr. ALT. Senator, we—our work here is really—our ability to talk about it publicly is really at the discretion of the OCC. The enforcement process, the supervisory process, is subject to legal restrictions. It is very difficult for us to engage directly with housing counselors unless the OCC wants to. I think it would be—I welcome the input of the housing counselors. I do believe they bring useful expertise. So that sort of transparency seems desirable to me. But I think the question is perhaps better directed to the OCC.

Ms. COHEN. Excuse me, Mr. Chairman——

Senator MENENDEZ. Yes. I was just going to turn to you next. I was not forgetting about you.

Ms. COHEN. I just wanted to——

Senator MENENDEZ. I wanted to lay a foundation here of what I guess is the operation, which is why we invited you. We agreed not to speak about your specific clients, but I do want to get a sense of your operation, how you are going about this. So I was going to turn to you. I will listen to whatever it is that you wanted to say, but I wanted to ask you a broader question. Has what you have heard here today assuaged your original statement in any respect?

Ms. COHEN. Thank you for your question, Mr. Chairman. The specific response I wanted to make is that we met with the OCC recently, with Ms. Williams. We asked for input. We asked for a meeting with the consultants. We were told that that may not be possible, and we were also told that the decision to do that is not theirs but is the decision of the consultants.

Your broader question is about whether I feel more comfortable now than I did before I came in the door and I would say, definitely not. Most of what we heard today underlines the role that the servicers have in driving the process, the vacuum that the consultants are operating in, and the absolute exclusion of the most important stakeholders in the process, the homeowners. We really appreciate your focus on them today.

Senator MENENDEZ. I want to dwell for a moment on your first part. You were told by the OCC that it may not be possible for you to engage in a conversation with the consultants and it was the consultants' decision to do that, not the OCC's?

Ms. COHEN. That is correct.

Senator MENENDEZ. Well, let us presume that is right for the moment, since we have you here. Is there any reason why, assuming the OCC says it is OK for you to do it, that you would not do it?

Mr. ALT. If I can—if the OCC is comfortable and I can have that conversation without getting into confidential supervisory information, I imagine we can have a conversation. But it is hard for me to envision how we can do that.

Senator MENENDEZ. Well, could there not be broad elements, that housing counselors have wide experiential factors, they have seen some reoccurring realities. Bringing those reoccurring realities to your attention would be helpful in your review, I would think.

Mr. ALT. Yes, Senator, absolutely, but the—I only work with one—well, I work primarily with one servicer and my firm works with three. If the housing counselors want input at a policy level, which is what I believe I hear you asking about, I do not work at the policy level. I work at the level of these individual servicers to execute the policy that is——

Senator MENENDEZ. Well, maybe my question is ill put. So housing counselors have an experiential factor that they have seen A, B, and C overwhelmingly take place that we would consider reasonable elements—let us say the OCC considers elements of harm, maybe 1 of the 20 examples, but they are done in a certain way. Giving you an insight as the independent consultant that is reviewing the files of those who make a claim with that background, would it not give you something to be looking at based upon the fact that there is a wide number of cases in which A, B, or C took place?

Mr. ALT. As I said earlier, Senator, I fully accept that the housing counselors have value to add here and I think their input could be very useful.

Senator MENENDEZ. Well, we will have to talk to the OCC because this is unacceptable to hear that they say it may not be possible, it is up to you. You tell me the OCC is the one that has to decide. So we are going to put everybody in the room and figure it out.

Ms. COHEN. Mr. Chairman?

Senator MENENDEZ. Yes.

Ms. COHEN. There is something in my testimony about the engagement letters. They appear to have been done through the General Counsel's office at the servicers and then with the consultants, and it appears to us that that was done to create an attorney-client privilege between the servicers and the consultants. I do not know if that is related to this, but it is something that seems to us like it is related.

Senator MENENDEZ. Well, we will get to it.

Finally, Dr. Sanders, I have great respect for your work, but I may have gotten this wrong. I may have understood you wrong in your testimony. Is your testimony that the potential economic costs outweighs the right of remedy for an individual?

Mr. SANDERS. No, that is not what I was saying. What I was saying——

Senator MENENDEZ. I am relieved.

Mr. SANDERS. No. I was saying that this is a very expensive process for the servicers and if there are damages to borrowers uncovered, by all means, that is what we should be doing. But what I am saying is that in terms of more steps, do we keep repeating this process over and over again? I am hoping this works very fine—

Senator MENENDEZ. So you are not criticizing this process as something that is undesirable or unwanted. You are saying that after this process is consummated, that you do not believe there should be any other iteration of it?

Mr. SANDERS. Well, no, not quite. What I am saying is I hope this solves everyone's angst, and we solve these types of problems. People receive remedies if due. What I am saying is that this is not costless to the banks and servicers. It is quite expensive. So if this solves it, I just want to be——

Senator MENENDEZ. That is very true. It is not costless to them. Neither was it costless to the individuals who may have been falsely brought into a process in which they were unjustly made the determination. Obviously, no one entered into consent agreements because they were holier than thou and had no harm committed upon anyone because they would have never agreed to such a consent agreement. So it just seems to me that there is a universe here of people who were harmed, and at the end of the day, they deserve, clearly, relief. I think it is easy to suggest that when you are not one of the persons harmed, it is very easy to say this has a cost. When you are one of the persons harmed, that is pretty significant.

Mr. SANDERS. Mm-hmm.

Senator MENENDEZ. With thanks to all of you for your testimony, the record will stay open for 1 week. Other Members of the Committee may ask questions in writing. We urge all of you to answer the questions as expeditiously as possible.

And with the thanks of the Committee for all of your testimony, this hearing is adjourned.

[Whereupon, at 4:31 p.m., the hearing was adjourned.]

[Prepared statements, responses to written questions, and additional material supplied for the record follow]:

PREPARED STATEMENT OF JULIE L. WILLIAMS

FIRST SENIOR DEPUTY COMPTROLLER AND CHIEF COUNSEL
OFFICE OF THE COMPTROLLER OF THE CURRENCY*

DECEMBER 13, 2011

Chairman Menendez, Ranking Member DeMint, and Members of the Subcommittee, I appreciate the opportunity to appear before you this afternoon. My testimony provides information on the status of the OCC's implementation of enforcement actions that direct the country's largest mortgage servicers to correct deficient and unsafe or unsound mortgage servicing and foreclosure processing practices and to provide remediation to borrowers who were financially harmed by those practices.[1]

The OCC appreciates the Committee's concerns regarding transparency and accountability throughout this process and my testimony provides up-to-date information in three main areas. First, I describe the independent foreclosure review process required by our enforcement actions, which will provide financial remediation to borrowers financially harmed by servicing and foreclosure process defects identified in our enforcement actions. Second, I describe other comprehensive actions under way required by our actions to correct deficient and unsafe or unsound practices in mortgage servicing and foreclosure processing. Third, I summarize initiatives stemming from the foreclosure crisis that will affect mortgage servicing standards and practices and enhance protections for borrowers in other important respects.

I. Background

Before addressing these three areas, it is useful to provide a brief background.

In the fall of 2010, following reports of irregularities in the foreclosure processes of several major mortgage servicers, the OCC directed the largest national bank servicers to conduct self-assessments to identify problems related to foreclosure processing. Concurrently, the OCC, the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation, and the Office of the Thrift Supervision (OTS) coordinated efforts to conduct "horizontal" examinations of foreclosure processing at 14 large federally regulated mortgage servicers during fourth quarter 2010.[2]

The examinations evaluated controls and governance over bank foreclosure processes, including compliance with applicable Federal and State law. Examiners evaluated bank self-assessments and remedial actions, assessed foreclosure operating procedures and controls, interviewed bank staff, and conducted an in-depth review of approximately 2,800 borrower foreclosure cases in various stages of foreclosure, spanning the 2009–2010 period. Examiners focused on foreclosure policies and procedures, organizational structure and staffing, third-party management, quality control and audits, accuracy and appropriateness of foreclosure filings, and loan document control, endorsement, and assignment. When reviewing individual foreclosure files, examiners checked for evidence that servicers were in contact with borrowers and had considered alternate loss mitigation efforts, including loan modifications.

In general, the examinations found the loans in the sample were seriously delinquent. However, the examinations also found critical deficiencies in foreclosure governance processes, document preparation processes, and oversight and monitoring of third parties. These deficiencies constituted unsafe and unsound banking practices, which also resulted in violations of certain laws, regulations, or rules. All servicers exhibited similar deficiencies, although the number, nature, and severity of deficiencies varied by servicer.

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*Statement Required by U.S.C. § 250:

The views expressed herein are those of the Office of the Comptroller of the Currency and do not necessarily represent the views of the President.

[1] Eight national bank servicers were examined by the OCC: Bank of America, Citibank, HSBC, JPMorgan Chase, MetLife Bank, PNC, U.S. Bank, and Wells Fargo. The OTS also examined four Federal savings association servicers and two holding companies: Aurora Bank, FSB; EverBank (and the thrift holding company, EverBank Financial Corp.); OneWest Bank, FSB (and its holding company IMB HoldCo LLC); and Sovereign Bank. On July 21, 2011, regulatory responsibility for Federal savings associations transferred from the OTS to the OCC under the Dodd-Frank Wall Street Reform and Consumer Protection Act. Consent orders taken by the OTS prior to the transfer against Federal savings associations remain in effect and enforceable by the OCC. Consent orders taken by the OTS against thrift holding companies remain in effect and enforceable by the Board of Governors of the Federal Reserve System.

[2] See "Interagency Review of Foreclosure Policies and Practices" (*http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011–47a.pdf*), April 13, 2011.

The sample of foreclosures reviewed as part of the interagency examination provided a basis for enforcement action; however, it is important to recognize that, due to the limited number of files that were reviewed, this process could not have identified the universe of borrowers who might have been financially harmed by those deficiencies.

On April 13, 2011, the OCC, the FRB, and OTS announced the issuance of cease and desist orders against each of the 14 servicers subject to our respective jurisdictions, and two service providers reviewed as part of the examinations. Crucial components of these enforcement actions are processes to identify borrowers who suffered financial injury as a result of the practices identified in the orders, and to provide financial remediation to them through an independent foreclosure review process.

II. Independent Foreclosure Review

The consent orders required the servicers to retain independent consultants to conduct comprehensive independent reviews of foreclosure activities in 2009 and 2010. The scope of work to be undertaken by the independent consultants was set out in engagement letters between each servicer and its consultant. The OCC reviewed these letters and required changes to ensure compliance with the intent of our orders and a level of consistency across the servicers. The OCC accepted the letters in late September, and made them publicly available on November 22, 2011.[3]

Since the acceptance of the letters in September 2011, the independent consultants have refined and adjusted processes, procedures, and methods outlined in the letters in consultation with OCC staff. In many cases, some details of the processes being implemented differ from those described in the letters because of subsequent direction from the OCC. Most notably, the OCC required changes to ensure a uniform and coordinated claims process among the servicers.

The independent consultants retained by each servicer to conduct these reviews of national banks and Federal savings associations are:

- AllonHill, LLC, for Aurora Bank;
- Clayton Services, LLC, for EverBank;
- Deloitte & Touche, LLP, for JPMorgan Chase;
- Ernst & Young, LLP, for HSBC and MetLife Bank;
- Navigant Consulting, Inc., for OneWest;
- PricewaterhouseCoopers, LLC, for Citibank and U.S. Bank;
- Promontory Financial Group, LLC, for Bank of America, PNC, and Wells Fargo Bank; and
- Treliant Risk Advisors, LLC, for Sovereign Bank.

The OCC required independence of the consultants and the law firms hired by the consultants. During the selection process, we rejected some proposed consultants and law firms to prevent conflicts of interest. We focused particularly on situations where consultants and law firms may have previously expressed positions on the issues on which they would be called upon to express independent judgment in the foreclosure review process. To formalize our expectations for independence from the servicers, the OCC required engagement letters to contain specific language stipulating that consultants would take direction from the OCC and prohibiting servicers from overseeing, directing, or supervising any of the reviews. The OCC specifically required each consultant to:

- Comply with requirements of the order and conduct each foreclosure review as independent from any review, study, or other work performed by the servicer or its contractors or agents with respect to the servicer's mortgage servicing portfolio or the servicer's compliance with other requirements of the consent order.
- Ensure its work under the foreclosure review would not be subject to direction, control, supervision, oversight, or influence by the servicer, its contractors, or agents.

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[3] See *http://www.occ.gov/topics/consumer-protection/foreclosure-prevention/independent-review-foreclosure-letters.html.* Some proprietary and personal information was redacted from the engagement letters prior to their release. Examples of redacted information include: names, titles, and biographies; proprietary systems information; references to specific bank policy; fees and costs associated with the engagement; and descriptions of past work performed by the independent consultants.

- Require immediate notification to the OCC of any effort by the servicer, directly or indirectly, to exert any such direction, control, supervision, oversight, or influence over the independent consultant, its contractors, or agents.
- Agree that the independent consultant is solely responsible for the conduct and results of the foreclosure review, in accordance with the requirements of article VII of the order.
- Pursuant to the monitoring, oversight, and direction of the OCC: 1) promptly comply with all written comments, directions, and instructions of the OCC concerning the conduct of the review, and 2) promptly provide any documents, work papers, materials or information requested by the OCC, regardless of any claim of privilege or confidentiality.
- Agree to provide regular progress reports, updates and information concerning the conduct of the foreclosure review to the OCC, as directed.
- Conduct the review using only personnel employed or retained by the independent consultant to perform the work required and not to employ services provided by the servicer's employees, contractors, or agents unless the OCC provides written approval.
- Adhere to requirements with respect to communication with the servicer, which provide for the independent consultant to use documents, materials, or information provided by the servicer, and to communicate with the servicer, its contractors, or agents, to conduct the review. Within these limits, agree that servicer's employees may not influence or attempt to influence determinations of the consultant's findings or recommendations.
- Agree that legal advice needed in conducting the review shall be obtained from the outside law firm whose retention to advise the independent consultants has been approved by the OCC and not to obtain legal advice (or other professional services) in conducting the review from the servicer's inside counsel, or from outside counsel retained by the servicer or its affiliates to provide legal advice concerning the order, or matters contained in the order.
- Require the servicer to agree that if the OCC determines that the consultant has not fully complied with the standards for independence, the OCC may direct the servicer to dismiss the consultant and retain a successor consultant.

These standards and oversight by the OCC are aimed at ensuring that the end result of the review, the findings and recommendations of the independent consultants, will be the product and opinion of those consultants, not of the servicers, their directors, their managers, or their attorneys.

The independent foreclosure review process includes two components—a coordinated claims process that will review cases based on borrowers' requests, and a "look-back" review that will examine cases identified by the independent consultants.

The Coordinated Claims Process

The coordinated claims process provides the opportunity for borrowers to request a review of their case if they believe they suffered financial injury as a result of errors, misrepresentations, or other deficiencies in foreclosure actions pertaining to their primary residence, between January 1, 2009, and December 31, 2010. For any financial injury that the reviews identify, the consent orders require financial remediation.

On November 1, 2011, outreach efforts began to inform "in-scope" borrowers of the review process. As described below, these efforts are multi-faceted, and we are continuing to make adjustments to improve the scope and effectiveness of the borrower outreach efforts.

To be "in scope" and eligible for review, a borrower's loan must have been active in the foreclosure process between January 1, 2009 and December 31, 2010; the property must have been the primary residence; and the loan must have been serviced by one of the servicers below:

America's Servicing Company
Aurora Loan Services
Bank of America
Beneficial
Chase
Citibank
CitiFinancial
CitiMortgage

Countrywide
EMC
Everbank/Everhome
GMAC Mortgage
HFC
HSBC
IndyMac Mortgage Services
Metlife Bank
National City
PNC
Sovereign Bank
SunTrust Mortgage
U.S. Bank
Wachovia
Washington Mutual
Wells Fargo

A loan is considered active in the foreclosure process if:

- The property was sold due to a foreclosure judgment.
- The loan was referred into the foreclosure process, in which case the borrower may have been notified in writing, but was removed from the process because payments were brought up-to-date or the borrower entered a payment plan or modification program.
- The loan was referred into the foreclosure process, but the home was sold or the borrower participated in a short sale or chose a deed-in-lieu-of-foreclosure action.
- The loan was referred into foreclosure and remains delinquent but a foreclosure sale has not taken place.

To inform borrowers of the coordinated claims process, the OCC has required direct mail, a Web site, a toll-free number, advertising, and other outreach.

Direct mail began on November 1, 2011, with an integrated claims processor, which all servicers are using, starting the process of mailing a request for review form to more than four million borrowers with instructions on how to fill out and return that form to request an independent review. The form walks borrowers through examples of situations that would be likely examples of financial injury, but it also allows borrowers to simply tell their story. The crucial objective is to get as much information as possible into the pipeline for an independent foreclosure review. Borrowers must return the form by April 30, 2012.

The direct mail effort includes use of address tracing methods to locate borrowers who lost their home to foreclosure. If an address is not current, the integrated claims processor will run the borrower data through a national change-of-address database to find a current address. Returned mail will be processed through a third-party consumer database using information from credit bureaus, public records and registrations, utilities, phone number databases, *etc.,* to determine most likely current addresses. Mail will be processed three times in an attempt to determine the most likely address. As of December 9, less than 5 percent of mailings have been returned undeliverable, and secondary addresses have been found for 57 percent of those where the tracing process has been completed.

As of December 9, 2011, more than 2.7 million letters have been sent, nearly 15,000 claims forms have been received, and the rate of completed forms returned for processing has increased significantly each week so far.

A Web site—*www.IndependentForeclosureReview.com*—and toll-free phone number—1–888–952–9105—were also launched on November 1, 2011. Both provide information about the review process. Assistance is available from the toll-free number Monday through Friday from 8 a.m. to 10 p.m., and Saturday from 8 a.m. to 5 p.m. (Eastern time). As of December 9, the Web site has been visited 280,643 times since its launch, an average of 7,385 visits per day. During that same period, the toll-free number has received 48,679 calls, an average of 1,281 per day, and over 3,317 callers have requested forms to be sent to them.

The outreach effort also will include print and online advertising. The print advertising includes full-page advertisements in widely read national publications (*e.g., Parade Magazine, People, TV Guide*). Additional publications that serve minority and underserved audiences also are being identified. The presently proposed print

advertising outlets have a combined circulation in excess of 60.5 million. The audience and reach of these advertisements include saturation in geographic and demographic sectors most affected by foreclosure. The first advertisements will appear in January.

The online advertising includes purchasing keywords (*e.g., "foreclosure review"*) on major search engines (*e.g.,* Google, Bing) to allow people to find information about the review more easily. By purchasing keywords associated with the foreclosure review, these efforts will redirect significant numbers of people to the independent foreclosure review Web site.

In addition to the mailings, Web site, phone number, and advertising by the servicers, other OCC outreach efforts include making housing counselors and community organizations aware of the independent foreclosure review through our electronic communications network and discussions with these groups. The announcement of the kickoff of the foreclosure reviews and the subsequent release of the interim report were distributed to more than 32,000 subscribers to our email information service. This electronic distribution network will be used to share additional communications about these reviews with interested community and consumer organizations as well as others who subscribe to this service.

The OCC is working with a number of public interest organizations involved in housing counseling to explain the foreclosure review process, and we have undertaken an ongoing dialogue with a number of groups regarding their concerns about the scope and effectiveness of the outreach program. These conversations have included constructive comments and suggestions, and will result in improvements to the outreach program. The outreach program is a work in process, and we continue our dialogue with these important organizations.

The OCC has also determined to offer a series of public service announcements in January 2012 which will include both print and radio spots in English and Spanish. The print items will be distributed to more than 7,000 local newspapers and publications. The 30-second radio items will be distributed to more than 6,500 small radio stations throughout the country. Spanish items are distributed to more than 700 Spanish-language newspapers and 500 Spanish-language radio stations. The public service items will highlight the toll-free number, the Web site, eligibility, and the deadline for action. Based on OCC's experience with similar public service placements, we expect the items to appear in radio and print more than 1,200 times in 40 states during January, February, and March.

"Look-Back" Reviews

In addition to the coordinated claims process, a "look-back" file review supplements the coordinated claims process to further identify deficiencies, errors, or misrepresentations that may have caused financial injury. In October, the independent consultants began selecting files for reviews, in accordance with plans contained in engagement letters submitted to, and accepted by, the OCC.

The consent orders allow the consultants to use sampling and other tools to identify certain types of files for review. Guidance from the OCC described methods and controls to ensure that samples are representative of the in-scope mortgages. The engagement letters contain descriptions of the statistical basis for the sampling methods used as approved by the OCC.

Some segments require 100 percent review, including cases involving the Servicemembers Civil Relief Act (SCRA), certain bankruptcy cases facing foreclosure in 2009 and 2010, cases referred by State or Federal agencies, and reviews requested through the coordinated claims process described above. With respect to SCRA cases, I would like to offer particular thanks to the Defense Manpower Data Center of the Department of Defense and the Department of Justice (DOJ). We reached out to both to explore how to effectively identify servicemembers whose cases should be reviewed as part of the 100 percent review. The result of that collaboration is that processes have been developed that will enable the names of all identified in-scope borrowers for each servicer to be batched-checked against servicemember information relevant to the in-scope period. This is an invaluable step to ensure that all eligible servicemembers are included in the 100 percent file review.

Mortgages in the sampling population may be segmented based on characteristics that include geography, third-party attorney, types of borrower history in paying mortgages, prior customer complaints, and participation in modification programs, such as the Federal Home Affordable Modification Program (HAMP). The segments and sizes of the samples selected for review were determined by the consultants, based on guidance from the OCC and in consultation with the servicers, but not determined or dictated by servicers.

In some cases, sampling may be appropriate at the outset, but initial results may lead to more in-depth review. These second-level reviews are subject to OCC oversight to ensure they are appropriately structured and implemented. The OCC expects the consultants to assess the results of the ongoing reviews continuously to identify potential "pockets" or systemic instances of financial harm and adapt the review plan accordingly. The tolerance for error is low—reliability, or confidence level, should not be less than 95 percent.

During the "look-back" reviews, the independent consultants must assess:

- Whether the foreclosing party had properly documented ownership or was otherwise a proper party to the action;
- Whether the foreclosure was in accordance with applicable State and Federal law;
- Whether the foreclosure sale occurred when a loan modification or other loss mitigation request was under consideration, or when the loan was performing in accordance with a trial or permanent loan modification, or when the loan had not been in default for a sufficient period to authorize foreclosure;
- Whether, for any nonjudicial foreclosure, the foreclosure sale and post-sale confirmations were in accordance with the mortgage loan and State law requirements;
- Whether a borrower's account was charged only fees or penalties permissible under the terms of the loan, applicable State and Federal law, and were reasonable and customary;
- Whether the frequency of fees assessed was excessive under the terms of the loan or applicable State and Federal law;
- Whether the requirements of HAMP and proprietary loss mitigation programs were followed; and
- Whether any errors, misrepresentations, or other deficiencies identified in the review resulted in financial injury to any borrower or mortgagee.

As of December 9, more than 56,000 files are actively under review.

Financial Injury and Remediation

When independent consultants find errors, misrepresentations, or other deficiencies, their next steps are to determine whether financial injury occurred and to recommend remediation when it does. Financial injury is defined as monetary harm directly caused by a servicer error. Examples of financial injury identified in joint OCC–Federal Reserve guidance that was provided to the independent consultants include, but are not limited to, the following:

1. The borrower was not in default pursuant to the terms of the note and mortgage at the time the servicer initiated the foreclosure action.
2. The servicer initiated foreclosure or conducted a foreclosure sale in advance of the time allowed for foreclosure under the terms of the note and mortgage or applicable State law.
3. The borrower submitted payment to the servicer sufficient to cure the default pursuant to the terms of the note and mortgage, but the servicer returned the payment in contravention of the terms of the note or mortgage, State or Federal law, or the servicer's stated policy covering payments when in default.
4. The servicer misapplied borrower payments, did not timely credit borrower payments (including failure to properly account for funds in suspense), or did not correctly calculate the amount actually due from the borrower, in contravention of the terms of the note and mortgage, State or Federal law, investor requirements, or the servicer's stated policy covering application of payments.
5. The borrower paid a fee or penalty that was impermissible.
6. A deficiency judgment was obtained against the borrower that included the assessment of a fee or penalty that was impermissible.
7. The servicer placed an escrow account on the mortgage and the placement resulted in monies paid by the borrower into escrow in contravention of the terms of the note or mortgage, State or Federal law, or the servicer's stated policy covering escrow accounts.
8. The servicer placed insurance on the mortgage and the placement resulted in monies paid by the borrower toward insurance in contravention of the terms of the note or mortgage, State or Federal law, or the servicer's stated policy covering placed insurance.

9. The servicer miscalculated the amount due on the mortgage and secured a judgment against the borrower for an amount greater than the borrower owed.
10. A borrower's remittance of funds to a third party acting on behalf of the servicer was not credited to the borrower's account.
11. The borrower was performing under the terms of an approved trial loan modification or an approved permanent loan modification, but the servicer proceeded to foreclosure in contravention of the terms of the modification offered by the servicer to the borrower.
12. A borrower was denied a modification in contravention of the terms of the governing modification program or the servicer's stated policy covering modifications.
13. There is evidence that the borrower provided or made efforts to provide complete documentation necessary to qualify for a modification within the period such documentation was required to be provided by the governing modification program and the servicer denied the loan modification in contravention of the terms of the governing modification program or the servicer's stated policy covering modifications.
14. The servicer initiated foreclosure or completed a foreclosure sale without providing adequate notice as required under applicable State law.
15. The servicer foreclosed on or sold real property owned by an active military servicemember in violation of SCRA.
16. The servicer did not lower the interest rate on a mortgage loan entered into by a military servicemember, or by the servicemember and his or her spouse jointly, in accordance with the requirements of SCRA.
17. The servicer failed to honor a borrower's bona fide efforts to redeem a sale under applicable State law during the redemption period.
18. The borrower was protected by the automatic stay under the bankruptcy code and a court had not granted a request for relief from the automatic stay or other appropriate exception under the bankruptcy code.
19. The borrower was making timely pre-petition arrearage payments required under an approved bankruptcy plan and was current with their post-petition payments.
20. The borrower purchased a payment protection plan; was or should have been receiving benefits under the plan; and those benefits were not applied pursuant to the contract.
21. The servicer was not the proper party, or authorized to act on behalf of the proper party, under the applicable State law to foreclose on the borrower's home, and this resulted in or may result in multiple foreclosure actions or proceedings.
22. The servicer failed to comply with applicable legal requirements, including those governing the form and content of affidavits, pleadings, or other foreclosure-related documents, where such failure directly contributed to: (a) the borrower paying fees, charges, or costs, or making other expenditures that otherwise would not have been paid or made; or (b) the initiation of a foreclosure action or proceeding against a borrower who otherwise would not have met the requirements for initiating such an action.

If the independent consultants determine that financial injury occurred as a result of errors, misrepresentations, or other deficiencies, they will develop recommendations for remediating that injury. In addition to providing guidance in the form of 22 scenarios where financial injury might be present, we are also considering guidance that will clarify expectations as to the amount and type of compensation recommended for certain categories of harm. Any such baseline expectations would not, however, override the independent judgment of the independent consultants. Rather the objective would be to help ensure remediation recommendations are consistent across the 12 OCC-supervised servicers for similarly situated borrowers who suffered similar harms. The independent consultants will always have the flexibility to take account of the facts and circumstances of individual borrowers to arrive at compensation tailored to the borrower's individual situation where the independent consultants determines a different amount of compensation is appropriate.

The reviews are expected to take several months to complete. However, independent consultants and servicers have implemented a process to escalate the review of borrowers' cases where foreclosure sale is imminent. The independent consultants and servicers have identified loans that have been scheduled for near term

foreclosure sale. Requests for review from in-scope borrowers in those cases are subject to special processes: prioritized review by the independent consultant and concurrent review by the servicer focused on rapid identification of bases to postpone the foreclosure action. To assure speed and consistency in the servicers review, we plan to provide direction on minimum criteria for this review.

III. Other Actions Required by OCC Consent Orders

In addition to the independent foreclosure review, our consent orders direct other work to correct unsafe and unsound practices in mortgage servicing and foreclosure processing. Work includes efforts to correct deficiencies in mortgage servicing activities, oversight and management of third-party service providers, activities related to Mortgage Electronic Registration Systems (MERS), management information systems, risk assessment and management, and compliance oversight.

Mortgage Servicing

The consent orders require servicers to correct deficiencies in mortgage servicing. Plans submitted by the servicers include:

- Measures to ensure that staff members handling loss mitigation and loan modification requests routinely communicate and coordinate with staff members processing foreclosures on the borrowers' properties;
- Deadlines for responding to requests for loan modifications and other communications from borrowers as well as deadlines for making final decisions on loan modification requests; deadlines must be at least as responsive as the timelines under HAMP;
- An easily accessible and reliable single point of contact established for each borrower throughout loan modification and foreclosure processes;
- A requirement for written communications to each borrower identifying the single point of contact and specifying how a borrower can communicate with the contact;
- A requirement that each single point of contact have access to data necessary to provide borrowers with timely, accurate, and complete information about the status of their loan modification requests and foreclosure cases;
- Measures to ensure that staff members are trained adequately about handling mortgage delinquencies, loss mitigation, and loan modifications;
- Procedures and controls to ensure that, before a foreclosure sale occurs, a final decision regarding a borrower's loan modification request (either on a trial or permanent basis) is communicated in writing to the borrower within a reasonable period and explains the reasons why the borrower did not qualify for the trial or permanent modification;
- Procedures and controls to ensure that, when a loan has been approved for modification on a trial or permanent basis, no foreclosure or further action preceding foreclosure occurs, unless the borrower defaults on the terms of the trial or permanent modification;
- Policies and procedures to enable borrowers to submit complaints about the loan modification process, denial of modification requests, the foreclosure process, or foreclosure activities that impede the pursuit of foreclosure prevention options, as well as a process for making borrowers aware of the complaint procedures;
- Procedures for promptly considering and resolving borrowers' complaints, including a process for timely communication of the resolutions;
- Policies and procedures to ensure that payments are credited promptly; that payments, including partial payments to the extent permissible under the terms of applicable legal instruments, are applied to scheduled principal, interest, and escrow before fees, and that any misapplication of borrowers' funds is corrected promptly;
- Policies and procedures to ensure that timely information about foreclosure prevention options is sent to borrowers in the event of delinquencies or defaults, including plain language notices about loan modifications and foreclosures;
- Policies and procedures to ensure that servicers properly maintain and track documents related to foreclosures and loan modifications, so that borrowers are not required to resubmit the same documents already provided, and that borrowers are notified promptly of the need for additional information; and
- Policies and procedures to consider loan modifications or other foreclosure prevention activities with respect to junior lien loans, and to factor the risks associated with such junior lien loans into loan loss reserving practices.

Each servicer has established policies and procedures for providing single points of contact to assist borrowers throughout the loan modification and foreclosure processes. Actions include the establishment of procedures for communicating information about the single points of contact to the borrowers including direct ways to reach these contacts; creation of training programs to instruct single points of contact about their responsibilities; establishment of specific organizational structures to perform these duties; and the creation of standard communication strategies for conveying information to and from borrowers. Servicers are required to initiate processes for establishing single points of contact and supporting procedures by the end of 2011.

All servicers have implemented controls to prevent "dual tracking" of loans to ensure no foreclosure or further legal action relating to foreclosure occurs when a borrower's loan has been approved for modification on a trial or permanent basis. Specific actions related to "dual tracking" vary from servicer to servicer but include review at designated points before the foreclosure sale, enhanced communication between loss mitigation and foreclosure processing staff, and development and use of matrices or checklists to ensure appropriate holds are placed on further foreclosure processing when appropriate.

Third-Party Management

The consent orders require servicers to improve oversight of third-party service providers that support mortgage servicing and foreclosure activities. The servicers submitted plans in July and work is under way to establish processes for appropriate due diligence in evaluating the qualifications of potential third-party service providers before entering into new contractual arrangements. The plans also provide for regular reviews of third-party service providers and assessment of their performance based on qualitative standards for competence, completeness, and legal compliance rather than standards based solely on the volume of foreclosures processed or the speed of processing. Additionally, the plans provide for the secure custody and accuracy of records transferred to these third parties during the foreclosure process.

Specific actions vary from servicer to servicer. Examples of actions include:

- Assessing risks associated with third-party activities to determine specific levels of oversight and activities based on identified risks.
- Establishing new policies, or enhancing existing policies, for oversight of third parties.
- Enhancing due diligence in assessing the capabilities of potential third parties.
- Establishing oversight committees to monitor the practices and activities of third parties, to implement processes to assure the quality of their work, and, if necessary, to terminate underperforming or noncompliant third parties.
- Creating procedures to track complaints about third-party activities and performance.
- Scheduling and conducting onsite audits and quality assurance processes of third parties.
- Including language in service contracts with third parties setting specific work standards.
- Periodically assessing the performance of third-party service providers, including attorneys and law firms providing foreclosure counsel, and the discontinuation of servicing contracts and agreements when appropriate.
- Improving management information systems used by third parties to ensure accuracy of records contained in, and transmitted by, those systems.

MERS

The consent orders require servicers to ensure appropriate oversight and controls of their activities with respect to MERS and compliance with MERSCORP's membership rules, terms, and conditions. Servicers' action plans submitted in July required, at a minimum:

- Processes to ensure that all mortgage assignments, endorsements, and all other actions with respect to mortgage loans serviced or owned by the servicer out of MERS' name are executed only by a certifying officer authorized by MERS and approved by the servicer;
- Processes to ensure that the servicer maintains up-to-date corporate resolutions from MERS for all servicer employees and third parties who are certifying officers authorized by MERS, and up-to-date lists of MERS certifying officers;
- Processes to ensure compliance with all MERS requirements and with the requirements of the MERS Corporate Resolution Management System;

- Processes to ensure the accuracy and reliability of data reported to MERSCORP, including monthly system-to-system reconciliations and daily capture of all reports of problems with registrations, transfers, and status updates on open-item aging reports; and
- An appropriate MERS quality assurance work plan and annual independent tests of the control structure of the system-to-system reconciliation process, the error correction process, and adherence to the servicer's MERS Plan.

Work is under way to implement these plans and includes:

- Incorporating MERS into servicers' third-party oversight programs, including periodic review, quality assurance, and independent audits.
- Enhancing controls and standardizing processes for executing mortgage assignments by MERS certifying officers.
- Establishing training, certification, and assignments and endorsements related to MERS.
- Improving processes for controlling data quality.
- Creating and executing quality assurance work plans to ensure accuracy and compliance with MERS-related procedures.
- Establishing periodic—in some cases daily—reconciliations of key reports and data to ensure compliance with MERS requirements and prompt resolution of discrepancies.
- Increasing the number of staff members dedicated to overseeing MERS-related activities.

Corrective actions to enhance oversight and controls of activities related to MERS are expected to be in effect by the end of the first quarter of 2012.

Management Information Systems

The consent orders require the servicers to improve management information systems that support mortgage servicing and foreclosure processing. Each servicer has submitted a plan for the operation of its management information systems for foreclosure and loss mitigation to ensure the timely delivery of complete and accurate information to permit effective decisionmaking regarding foreclosure, loan modification, or loss mitigation. The plans include descriptions of systems used by servicers for foreclosure and loss mitigation purposes. They also include timetables for changes or upgrades necessary to monitor compliance with legal requirements, servicing guidelines of Government-sponsored enterprises (GSE), and requirements of the consent orders. Improvements to management information systems will ensure accuracy of records and provide staffs working on foreclosures and loss mitigation efforts access to necessary and timely information provided by the borrowers. Work is under way and includes:

- Consolidation of mortgage servicing platforms.
- Standardized and automated workflows to assist personnel with loan modification and foreclosure decisions and processing.
- Development of standardized reporting and improved quality controls.
- Implementation of case management software to provide better access to single points of contact interacting with borrowers.
- Periodic audits.
- Evaluation of requirements and documentation to ensure that management information systems meet the needs of stakeholders from mortgage servicing, loss mitigation, foreclosure processing, and MERS-related activities.
- Escalation and enhanced reporting to executives and boards of directors.

Enhancing management information systems is a continuous process. Substantive improvements have been made and will continue throughout the next year.

Risk Assessment and Risk Management

The consent orders require the servicers to assess risks posed by their mortgage servicing operations and develop plans to manage those risks. Servicers have conducted their assessments and developed specific action plans to effectively mitigate or manage identified risks on an ongoing basis. Work on those plans is under way and includes:

- Conduct periodic third-party audits or self evaluation of risks associated with mortgage servicing and foreclosure processing.

- Conduct periodic assessment of risks and develop action plans to reduce risks from specific functional areas, including loan modifications, disposition of bank-owned real estate, bankruptcy, and compliance with SCRA.
- Strengthen policy and internal guidance concerning foreclosure and loss mitigation.
- Identify specific individuals or groups accountable for compliance and operational risk associated with mortgage servicing and foreclosure practices.
- Integrate key processes to ensure consistency of policy and procedures related to foreclosure and loss mitigation activities.
- Establish additional training associated with foreclosure and loss mitigation risks.
- Develop and report key indicators to support monitoring and evaluating risk.
- Use compliance testing on a regular basis.

Implementation of risk management plans is expected to be in effect during the first quarter of 2012. Assessment and monitoring will be an ongoing servicer activity.

Compliance Committees, Compliance Programs

The consent orders require a number of actions to ensure compliance with the orders and with applicable laws and regulations. As a result during the third quarter of 2011, the servicers set up compliance committees responsible for the development and implementation of compliance programs, action plans, policies and procedures, and strengthened operating processes to correct the deficiencies cited by the enforcement actions. At a minimum, each committee includes three members of the institution's boards of directors. The compliance committees are also responsible for reporting actions required by the enforcement orders, and for taking corrective action for any ongoing or repeated noncompliance.

The consent orders required comprehensive action plans to address compliance. Servicers submitted those plans in July, and work is under way to implement the plans. Plans addressed financial and personnel resources, organizational structure, and specific controls to ensure the affidavit, declarations, and notarization processes comply with applicable laws and regulations.

Actions vary by servicers and include:

- Changed management and leadership to ensure accountability and clarify responsibilities for mortgage servicing, foreclosure, and loss mitigation.
- Changed reporting structures to centralize oversight of mortgage servicing, foreclosure, and loss mitigation functions.
- Increased number of personnel responsible for conducting audits and dedicated to ensuring compliance, as well as for mortgage servicing, foreclosure, loss mitigation, and information technology supporting these functions.
- Implemented training programs for signers of sworn documents and notaries to emphasize the personal knowledge required and specific requirements of State law.
- Increased training requirements for customer assistance specialists, single points of contact, and compliance personnel.
- Brought previously outsourced preparation of sworn documents in-house.
- Created or revised templates for sworn documents to conform more closely with State and local laws, in judicial and nonjudicial foreclosure states.
- Implemented quality control processes to ensure proper completion of sworn documents, including, at some servicers, real-time monitoring by dedicated quality assurance staff.
- Established foreclosure referral checklists to verify loss mitigation efforts, bankruptcy status, and the borrower's status related to the SCRA.
- Established dedicated units to specialize in SCRA and to correct SCRA-related issues.
- Established testing of loan modification denials, sworn document completion, and regulatory compliance, as part of quality control initiatives to verify compliance with loan modification program requirements, GSE loan servicing guidelines, and Federal laws including SCRA and bankruptcy.
- Established periodic evaluations by senior managers of policies, staffing, and functional performance related to mortgage servicing, foreclosure, and loss mitigation.

As work continues to improve compliance controls across the servicers, the OCC expects the servicers to complete the implementation of new processes, policies, and enhanced controls during the first part of 2012.

IV. Other Efforts to Enhance Mortgage Servicing Standards and Practices

While the actions taken under our consent orders are significant, there are a variety of other efforts, stemming from the foreclosure crisis, that are underway at the Federal and State levels that will affect mortgage servicing standards and practices and enhance borrower protections. The following summarizes some of those efforts.

Interagency Effort to Establish Uniform Mortgage Servicing Standards

Staff from the OCC, FRB, Federal Deposit Insurance Corporation, Consumer Financial Protection Bureau (CFPB), and other participating agencies are working to develop proposed national standards to address all aspects of mortgage servicing. Ideally, key requirements would be in the form of enforceable regulations, supplemented with compliance guidelines that can be used to fill in details and provide illustrations of practices that comply with the regulatory standards. The objective is to achieve rigorous, uniform "rules of the road" for responsible servicer conduct. It is vital that any standards that the agencies adopt apply to, and are implemented by, all firms engaged in mortgage servicing—not just federally regulated depository institutions—and that there is strong oversight of all servicers' compliance.

Other Federal and State Attorneys General Settlement Activities

For well over a year, the OCC has been in regular communication with the DOJ and other Federal agencies regarding our foreclosure-related enforcement actions and how those actions relate to other Federal and State enforcement and settlement activities that may pertain to the types of activities covered by our orders. For example, we discussed with the DOJ how the detailed action plans required by the orders, particularly for mortgage servicing and foreclosure procedures, had the potential to synchronize with the terms of the settlement under discussion with the same mortgage servicers, State attorneys general, DOJ, and certain other Federal agencies. On June 13, 2011, the OCC, the FRB, and the OTS announced a 30-day extension of certain timelines under the orders—at the request of the DOJ—to facilitate that process of coordination of servicer actions. We continue a constructive dialogue with the DOJ on all these subjects.

Changes in Federal Law: Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) has several provisions that affect mortgage servicing. It amended the Truth-in-Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA) and granted authority for these and other "enumerated consumer protection laws" to the CFPB on July 21, 2011.

The amendments to TILA require periodic notices to borrowers disclosing information related to the servicing of the loan and prohibit fees for providing a statement of balance or for modifying a high cost mortgage; impose requirements for establishing and disclosing escrow accounts for a variety of mortgages; and require timely payoff notices and payments be credited on the date of receipt. The amendments to RESPA regulate the force-placement of hazard insurance, and require timely response to borrower complaints, contact information for the owner or assignee of the mortgage; and compliance with "any obligation found by the [CFPB] to be appropriate to carry out the consumer protection purposes of [RESPA]." The Dodd-Frank Act also requires the Secretary of the Department of Housing and Urban Development (HUD) and the Director of the CFPB, in consultation with the Federal banking agencies, to create a database with information on delinquent loans and foreclosures. Finally, the Dodd-Frank Act authorizes the CFPB to issue regulations that identify as unlawful "unfair, deceptive, or abusive" practices in connection with mortgage servicing.

Changes in GSE Guidelines

In addition to these new requirements under Federal laws, Fannie Mae and Freddie Mac announced two initiatives related to servicing that could have widespread impact. The first, announced with the Federal Housing Finance Agency (FHFA) and HUD in January 2011, would lead to new compensation structures that determine how servicers of single-family loans in mortgage-backed securities pools are paid. This initiative would align compensation structures with the objective of improving service for borrowers, providing flexibility in servicing nonperforming loans, and promoting liquidity in the mortgage securities market. On September 27, 2011, at the direction of the FHFA, the GSEs' issued a discussion paper, "Alter-

native Mortgage Servicing Compensation," setting forth a series of potential approaches and inviting public comment.

The second GSE initiative, announced in June, is to develop uniform policies for servicing delinquent loans that will enhance and streamline outreach to delinquent borrowers and establish performance-based monetary incentives for compliance. Under these guidelines, which largely took effect October 1, 2011, a foreclosure will not be permitted on a mortgage owned or guaranteed by Fannie Mae or Freddie Mac until the servicer has conducted a formal review of the borrower's eligibility under all available foreclosure alternatives, including loan modifications, short sales, and deeds in lieu of foreclosure. Servicers will be expected to continue to help these borrowers qualify for a foreclosure alternative. Given the significance of the GSEs to the mortgage market, these new standards will act as the catalyst for conforming changes nationwide.

V. Conclusion

The consent orders issued by the OCC, the FRB, and the OTS in April were significant steps toward ensuring this country's mortgage servicing industry operates in a safe and sound manner and borrowers are treated fairly. As a result of these actions more than four million borrowers involved in the foreclosure process in 2009 and 2010 have the opportunity to receive free, independent reviews of their cases. Where wrongful financial injury is identified, our consent orders require remediation. We expect to issue a report on the results of the independent foreclosure review at the conclusion of that effort. In addition to the independent foreclosure review, other efforts required by our orders are well under way to correct deficiencies in mortgage servicing and foreclosure processing that our examiners identified in their reviews during the fourth quarter of 2010. Much of the work to correct identified weaknesses in policies, operating procedures, control functions, and audit processes will be substantially complete in the first part of 2012; other initiatives will continue through the balance of 2012. OCC examiners provide ongoing oversight to this process and will continue to monitor efforts to ensure compliance with our consent orders.

I appreciate the opportunity to appear before the Subcommittee this afternoon, and look forward to addressing your questions.

Helping Homeowners Harmed by Foreclosures:
Ensuring Accountability and Transparency in Foreclosure Reviews

Written Testimony
of

Alys Cohen
National Consumer Law Center

also on behalf of

Americans for Financial Reform, California Reinvestment Coalition, Community Legal Services of Philadelphia, Connecticut Fair Housing Center, Consumer Action, Consumers Union, Empire State Justice Center, Financial Protection Law Center, Housing and Economic Rights Advocates, Legal Aid Center of Southern Nevada, Inc., Legal Aid Society of Milwaukee, Inc., Michigan Foreclosure Task Force, National Association of Consumer Advocates, National Council of La Raza, National Community Reinvestment Coalition, National Fair Housing Alliance, National People's Action, Neighborhood Economic Development Advocacy Project, North Carolina Justice Center, Woodstock Institute

Before the United States Senate Subcommittee on
Housing, Transportation, and Community Development of the
United States Senate Committee on
Banking, Housing, & Urban Affairs

Dec. 13, 2011

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I. Introduction

Chairman Menendez, Ranking Member DeMint, and members of the Subcommittee, thank you for inviting me to testify today regarding the mortgage servicing consent orders being implemented by the federal bank agencies.

I testify here today on behalf of the National Consumer Law Center's low-income clients. On a daily basis, NCLC[1] provides legal and technical assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country.

I also testify here today on behalf of Americans for Financial Reform, the California Reinvestment Coalition, Community Legal Services of Philadelphia, the Connecticut Fair Housing Center, Consumer Action, Consumers Union, the Empire Justice Center, the Financial Protection Law Center, the Housing and Economic Rights Advocates, the Legal Aid Center of Southern Nevada, Inc., Legal Aid Society of Milwaukee, Inc., the Michigan Foreclosure Task Force, the National Association of Consumer Advocates, the National Council of La Raza, the National Community Reinvestment Coalition, National Fair Housing Alliance, National People's Action, the Neighborhood Economic Development Advocacy Project, the North Carolina Justice Center, and the Woodstock Institute.

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[1] The **National Consumer Law Center, Inc.** (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eighteen practice treatises and annual supplements on consumer credit laws, including *Truth In Lending* (6th ed. 2007) and *Cost of Credit: Regulation, Preemption, and Industry Abuses* (3d ed. 2005) and *Foreclosures* (2d ed. 2007), as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted training for thousands of legal services and private attorneys on the law and litigation strategies to deal predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. This testimony was written by Alys Cohen, Staff Attorney, and Diane E. Thompson, Of Counsel. Information on the other organizations on whose behalf this testimony is submitted may be found in Appendix A.

I have worked as an attorney in the area of sustainable mortgage lending for almost fifteen years. I have spent the last eight at NCLC providing technical assistance, training, and policy guidance to attorneys, housing counselors, policymakers, and others. In my role at NCLC, I have focused primarily on mortgage lending and servicing, and have spent the last several years following and advocating for mortgage servicing regulation. I have followed closely regulatory developments in mortgage servicing, including the April consent orders and the November roll out of the foreclosure reviews.

In the face of a foreclosure crisis of unprecedented proportions, the regulatory response has been staggeringly inadequate. The consent orders and foreclosure reviews leave unaddressed egregious violations of law by the servicers and fail to provide any meaningful redress for wronged homeowners. The current process is opaque, leaves too much control in the hands of the servicers—the firms that created the mess in the first place—and threatens to strip further rights from homeowners. Given the numerous shortcomings in the process and the potential that homeowners will be injured by the current implementation of the consent orders, we recommend that the Consumer Financial Protection Bureau take over the process of implementing the orders.[2] The CFPB is in a better position to balance the needs of financial institutions with those of homeowners facing foreclosure. The banking agencies have established a process that repeatedly favors banks over homeowners. That process cannot be permitted to continue.

[2] This action was brought as a safety and soundness enforcement action by the OCC, not under its UDAP jurisdiction. While these unfair and deceptive practices are certainly not conducive to safety and soundness, in this case the root conduct under scrutiny is clearly the unfair practices, and the OCC's failure to invoke that jurisdiction in this context can only be seen as an effort to protect the large banks from the supervisory oversight of the CFPB.

The foreclosure crisis, the worst this nation has ever known, is not even half over. [3] Homeowners, neighborhoods, and cities across the country face the economic and emotional toll occasioned by soaring rates of vacant and abandoned properties. This widespread pain is not evenly distributed: communities of color face disproportionately high rates of foreclosure and ensuing vacancies.[4] Frustration and anger on the ground have been growing, as demonstrated by the December 6th Occupy movement's day of action focused on defending foreclosure-related evictions.[5]

Government intervention in this crisis has been narrow and mostly unsuccessful. While the Home Affordable Modification Program (HAMP) established the beginnings of a framework for appropriate and sustainable loan modifications, only a fraction of eligible homeowners have obtained access to this program, largely due to unaddressed servicer noncompliance.[6] Half of the government funding for the Emergency Homeowners Loan Program (EHLP), the program to aid unemployed homeowners, has been returned to the Treasury unused,[7] and the refinancing program, HARP, leaves out homeowners who are in default—the ones who need assistance the most—while also excluding those homeowners, mostly seniors, who have managed to maintain equity in their

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[3] Debbie Gruenstein Bocian, et al., Ctr for Responsible Lending, *Lost Ground, 2011* (Nov. 2011), *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf (finding at least 2.7 million mortgages loans originated between 2004 and 2008 ended in foreclosure , with almost 4 million more home loans originated during the same period are at serious risk; estimating that the crisis will continue for another five to ten years).

[4] Bocian, *supra* 3 (while most of those who have lost their homes are white, African-American and Latino borrowers have been disproportionately affected. Approximately one fourth of these borrowers have lost their home to foreclosure or are seriously delinquent, while this figure is just under 12 percent for white borrowers). Across the country, low- and moderate-income neighborhoods and neighborhoods with high concentrations of minorities have been hit especially hard.

[5] Justin Elliot, *Occupy's Next Frontier: Foreclosed Homes*, Salon.com, Nov. 30, 2011.

[6] Paul Kiel, *Secret Docs Show Foreclosure Watchdog Doesn't Bark or Bite*, Pro Publica, Oct. 4, 2011 (noting that fewer than 800,000 have received loan modifications, fewer than 1 in 4 who have applied, and detailing rampant noncompliance by GMAC that has gone mostly unaddressed by the Treasury Department), *available at* http://www.propublica.org/article/secret-docs-on-foreclosure-watchdog/single.

[7] Cara Buckley, *U.S. Mortgage-Aid Program Is Shutting Down, With Up to $500 Million Unspent*, N.Y. Times, Sept. 29, 2011 at A20.

homes. Nearly five years into the crisis we still have no plan for principal reductions for the over one in four, or nearly 15 million, households that are underwater.[8] Only now is the Federal Housing Finance Agency considering a proposal to allow no-interest periods in Chapter 13 bankruptcy payment plans, which would provide principal reductions for some homeowners in bankruptcy. This plan, if adopted, will make a substantial difference to many homeowners, but cannot on its own help enough of them. The FHFA's servicing alignment initiative (SAI) in many ways is a step back from the standards established under HAMP. Although the FHFA's SAI establishes a better process for reviewing homeowners for modifications prior to initiation of foreclosure, it establishes stiff penalties for slowing the foreclosure once it has started, even where a homeowner has requested a loan modification.[9] The SAI's new standard loan modification is more expensive and less sustainable than HAMP modifications and perpetuates practices from the unsustainable lending that caused the crisis in the first place.[10] Although efforts continue by the state Attorneys General to hold the big servicers accountable,[11] any ultimate results at the state level are necessarily of limited reach. Nationwide enforcement and mortgage servicing standards are essential to stopping the onslaught of unnecessary foreclosures.[12]

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[8] Jill Simmons,*Home Values Flat in the Third Quarter on Slow Road to Housing Market Bottom* Zillow Blog (Nov. 7, 2011), http://www.zillow.com/blog/2011-11-07/home-values-flat-in-third-quarter-on-slow-road-to-housing-market-bottom/. According the U.S. Census 2009 American Housing Survey, Mortgage Characteristics, Table 3-15, *available at* http://www.census.gov/housing/ahs/data/ahs2009.html, there are approximately 50,300,00 owner-occupied properties with mortgages on them; 28.6% of 50,300,000 is 14,385,800..

[9] *See* Fannie Mae SVC-2011-08R (Sept. 2, 2011); Freddie Mac Guide Bulletins 2011-11(Implementation Requirements), 2011-16 (Standard Modification, *see also* Guide Chapter B65, Workout Options), 2011-17 (Post Referral Solicitation Requirements), & 2011-19 (Update).

[10] For example, the current modification interest rate is 5%, Fannie Mae, Announcement SVC-2011-08R at 28 (Sept. 2, 2011), although the current Freddie Mac primary mortgage market survey rate is 4%. *See* www.freddiemac.com. Similarly, the front-end DTI may reach 55% , Fannie Mae, Announcement SVC-2011-08R at 27 (Sept. 2, 2011), far in excess of the 31% front-end DTI that has supported HAMP loan modifications with low redefault rates..

[11] Gretchen Morgenson, N.Y. Times, *Massachusetts Sues Five Major Banks over Foreclosure Practices*, Dec. 2, 2011 at B1.

[12] While certain minor improvements to mortgage servicing were included in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010), the key factors driving servicers to prioritize foreclosures over modification have not been addressed in any forum.

The latest submission in the list of ineffective and potentially harmful responses to the foreclosure crisis is the joint OCC and FRB action against the nation's major mortgage servicers. The orders themselves are vague and weak, and the foreclosure review—the centerpiece of the actions and the tool geared to homeowner remedies—is unlikely to prevent or reverse wrongful foreclosures or to provide sustainable solutions going forward. The lack of transparency and input into the process undermines public confidence as well as outcomes. To the extent homeowners do participate in the process, there remains the possibility that servicers will use the process to strip homeowners of their legal rights. The orders and the foreclosure reviews provide, at best, little more than window dressing for business as usual, even though business as usual has left us in the worst foreclosure crisis in our nation's history and the worst economic crisis since the Great Depression.

The orders do not remove the need for national servicing standards. The standards adopted by the OCC and FRB permit the servicers wide discretion in creating their own servicing standards to suit their own purposes. These standards, moreover, apply only to a select group of servicers, lack significant enforcement or oversight mechanisms, and, outside of a narrow time window, provide no relief for homeowners injured by violations. In their blessing of dual track, the orders represent a step backwards from existing standards under HAMP and the FHFA SAI, and the lack of transparency shelters servicers in their abuse of homeowners.

The stakes are high, especially in light of the disgraceful history of servicer noncompliance, even with specific and explicit rules. Servicers do not believe that the rules that apply to everyone else apply to them. This lawless attitude, supported by financial incentives and too often tolerated by regulators, is the root cause of the wrongful foreclosure of countless American families. Whether

servicers' errors are the result of intentional wrongdoing or mere incompetence, the result is the same: homeowners, investors, and the communities we all live in suffer, while servicers continue to profit. This process encourages the servicers to perpetuate abuses unchecked while hiding behind a fig leaf of reform and accountability. It is time to transfer oversight of all consumer protection actions involving servicers to the CFPB, as Congress intended in enacting the Dodd-Frank Act.

II. The Mortgage Servicing Consent Orders Are Vague and Weak, Setting the Stage for an Inadequate Foreclosure Review Process

On April 13, 2011, the federal banking agencies announced enforcement actions against mortgage servicers and other firms relating to problems with foreclosures.[13] The OCC is now overseeing the majority of the servicers implementing the consent orders, while the Federal Reserve is supervising four.[14] On November 1, 2011, the OCC and FRB announced the initiation of an outreach process to homeowners eligible for foreclosure reviews by the consultants. Although there is some variation between the agencies, and from servicer to servicer, the individual processes share major flaws.

The consent orders and the foreclosure review process as enunciated to date lack the rigor and breadth to ensure that homeowners are protected during the review process. The process may also be affirmatively harmful. Homeowners could be required to waive their rights in exchange for any available relief. Homeowners may be discouraged from pursuing other avenues of saving their homes by their misplaced reliance on this process. If so, homeowners could ultimately lose their homes in exchange for the uncertain and limited compensation provided under the foreclosure reviews.

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[13] *See, e.g.*, http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html.

[14] Although the OCC and the FRB are both implementing consent orders against mortgage servicers, the OCC has released substantially more information. Our comments will focus on the information currently available, and thus are based primarily on materials released by the OCC.

Many of the deficiencies in the foreclosure review process being undertaken by the consultants have their origins in the consent orders. While the agencies could improve the process despite the orders, and could even re-open the consent orders, the process as it exists has substantial unaddressed weaknesses. The process cannot produce fair and equitable relief sufficient to address the scale of the crisis.

The time limit on eligibility may disparately impact communities of color. The reviews are time limited: they focus only on 2009 and 2010. Abuses occurring before or after this time will not be looked at. Because the subprime foreclosure wave came first, the review may disproportionately exclude low-income homeowners and homeowners of color, who were more likely to have received subprime loans.

Necessary detail is lacking. The consent orders provide no guidelines on loss mitigation or on evaluations for core servicing abuses, including application of payments, assessment of fees, or force-placed insurance. The lack of detail allows the servicers, the perpetrators of the illegalities recognized by the banking agencies in issuing the consent decrees, to control the independent review process and obscure many violations. In combination, the lack of detail and the unusual deference extended to the servicers undercut the possibility of meaningful change going forward.

Dual track is affirmed. The agencies fail to address "dual track"—the simultaneous processing of a loan modification and a foreclosure—in any effective way. The persistence of dual track has led to countless unnecessary and expensive foreclosures. Although the agencies purport to address dual track, the orders only stop a foreclosure when a homeowner has already obtained a trial or permanent loan modification. This result is probably dictated by contract law and is certainly not a far-reaching reform of current practice. The establishment of a foreclosure stop once

a modification has been entered into is a commonplace part of how modifications are administered currently; if you are paying on your loan, then you should not be subject to foreclosure. (Of course, servicers often fail even at this basic step). A foreclosure stop after a loan modification agreement is entered into does not end dual track, but blesses it, allowing an evaluation for a loan modification to occur simultaneously with the foreclosure. The result always is financial harm to homeowners and often wrongful foreclosure.

The orders do not even require a stop to foreclosures during the consultants' review process. Thus, a homeowner could be under review for the servicer's wrongful initiation of foreclosure, and the servicer could even ultimately be found to have wrongfully initiated foreclosure, and there would be no requirement to stop the foreclosure, leaving the homeowner a victim of wrongful foreclosure. The failure to provide for a foreclosure stop during review makes a mockery of any suggestion that the foreclosure review process will make homeowners whole. This result is so obviously wrong that few homeowners are likely to anticipate it; many homeowners may believe that, having submitted their claim form, they will not be dispossessed of their homes until a decision has been made as to the legality of the servicers' action. This is one of many ways that the foreclosure review process may exacerbate the harm already suffered by homeowners.

Significantly, in failing to require that the review be completed before the foreclosure sale, and that foreclosure actions be halted during the pendency of the review, the agencies have taken a gigantic step backward from existing standards under HAMP and the FHFA's SAI. Despite the

limitations of both HAMP and the FHFA's SAI,[15] neither permits a home to be sold at foreclosure while under review. The agencies' foreclosure review process condones that result.

The orders lack transparency and accountability. The consent orders have no provisions for transparency in their implementation. The agencies have not committed to reporting the results of the reviews or providing information about the compensation provided homeowners. Periodic reports broken down by the state, race, income level, and property value of the homeowner, as well as by servicer and consultant are essential. The public is entitled to know how many homeowners are contacted, how many respond, what violations are found, and how much compensation is provided. Congress, affected homeowners, and the public at large cannot have confidence that the process is fair, consistent, and provides affected borrowers with adequate compensation absent transparency. Without transparency, there cannot be accountability for promises of an improved performance in the future.

There are no meaningful provisions for accountability. Servicers may not face any penalties for violations. The orders fail to provide directly for either bankruptcy or foreclosure court judges to enforce their terms, leaving homeowners at the mercy of the consultants' review. In many cases, the "project leads" of the foreclosure reviews are the servicers' own general counsel office.[16]

Homeowners have no express right to enforce these agreements. The agencies have referred to this process as a supervisory action. Such actions often remain non-public and solely in the purview of the regulator. This process, however, asks millions of homeowners to submit

[15] Neither HAMP nor SAI require the crucial step of a general stop to foreclosures already initiate. *See generally The Need for National Mortgage Servicing Standards: Hearing Before the S. Subcomm.. on Hous., Transp., & Cmty. Dev.*, 112th Cong. 31-35 (2011) (written testimony of Diane E. Thompson, Of Counsel, Nat'l Consumer Law Center) (discussing weaknesses of the FHFA's SAI); *Problems in Mortgage Servicing from Modification to Foreclosure: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 111th Cong. 3-5, 8-17 (2010) (written testimony of Diane E. Thompson, Of Counsel, Nat'l Consumer Law Center) (discussing failures of HAMP) when a modification is being reviewed.

[16] *See* Francine McKenna, *OCC Foreclosure Review Disclosures Still Disappoint*, Am. Banker, Dec. 6, 2011 (noting that many of the servicers assert attorney-client privilege in the engagement letters with the independent consultants).

personal information (and potentially waive all legal rights) in exchange for possible but indefinite compensation. Homeowners cannot rely solely on the outcome of a secret, vague process to ensure they do not lose their homes. Nor should they be asked by servicers—who already have been found to have committed wrongdoing—to waive all rights in exchange for compensation unlikely to provide relief commensurate with the harm done.

The orders could interfere with state enforcement actions. While the Federal Reserve and the FDIC clearly stated that these actions in no way are intended to interfere with the actions currently underway by the U.S Department of Justice and the state Attorneys General, the OCC has not made such a statement. The OCC's history of seeking to interfere with state enforcement of consumer protection laws does not inspire confidence that the agency will allow the work of the Attorneys General to go forward unimpeded. As discussed further below, during the years leading up to the current foreclosure crisis, the OCC aggressively tried to block state enforcement actions that could have dealt effectively with many of the industry practices that are wreaking havoc upon the American public today.[17] These consent orders appear to continue that pattern of attempting to block effective action at the state level, while permitting abusive practices by federally-regulated institutions to continue unchecked.

Millions of homeowners have been victimized by the fraudulent and abusive practices of mortgage servicers whose staff are trained for collection activities rather than loss mitigation, whose infrastructure cannot handle the volume and intensity of demand, and whose business records are a mess. The federal agency consent orders and the associated foreclosure reviews do not begin to adequately address these issues. They do not provide the accountability and rigor required to right

[17] *See* III.F.

this foreclosure crisis. To the extent these consent orders embolden servicers in their illegal activities and encourage homeowners to believe that the servicers are in fact subject to meaningful oversight, the foreclosure review process will affirmatively harm homeowners.

III. The Foreclosure Review Process Is Ineffective, Fails to Target Key Foreclosure Problems, and Does Not Protect Homeowners from Further Harm

The foreclosure review process is fatally flawed. Every aspect errs on the side of bank comfort over accountability. Many of these problems could have been prevented if the OCC and the FRB had not followed a hasty and closed process but had incorporated recommendations from homeowner stakeholders. Restoring credibility would require new supervision and a fresh approach.

A. The Process Allows Wrongful Foreclosures During the Review Process

Homeowners filing claims under the foreclosure review process will be expecting a fair review and appropriate compensation. At a minimum, they are not expecting to lose their homes while they are waiting for long-needed help. Unfortunately, their homes are not protected.

The review process does not limit a servicer or consultant's actions regarding foreclosures, including sales, during the review process. The OCC's FAQs state in part:

> The submission of a request for review form will not automatically postpone further foreclosure processing. However, the borrower will receive expedited attention where a foreclosure sale is imminent. This review will involve a case-by-case assessment of the borrower's individual circumstances and any legal requirements to determine if a foreclosure sale may be postponed or halted if the facts warrant.[18]

While some homeowners may be lucky enough to find out their sale has been stopped or their case has been escalated during the review, even these minimal standards are not publicly available and thus are subject to abuse and inconsistent application. Because foreclosure halts are not clearly

[18] *Frequently Asked Questions Regarding the Interagency Foreclosure Enforcement Actions*, Office of the Comptroller of the Currency, *available at* http://www.occ.treas.gov/topics/consumer-protection/foreclosure-prevention/foreclosure-faqs.html.

available, additional wrongful foreclosures may actually occur during the review. Those wrongful foreclosures may not be remedied at all. Moreover, a foreclosure sale that was not imminent or even scheduled at the time of the submission of a claim may become so during the review of the claim. How will the independent consultants know when a foreclosure sale is imminent when the servicers do not even always know themselves?

- A Washington state woman, who was current under a temporary payment agreement, received an eviction notice. The servicer's representative told the woman, when she called, that she was mistaken at best, and a liar at worst, and that there was no foreclosure action against her. Nonetheless, the purchaser of the property succeeded in evicting the family, who are now living in an apartment and have lost nearly $200,000 in equity.
- A California family was foreclosed on after high-level executives at the bank assured the homeowner's attorney that the foreclosure sale would be stopped.
- Another California family has spent two years unwinding a foreclosure sale that happened while they were making payments under a temporary forbearance agreement. It took multiple phone calls to the servicer before the servicer acknowledged that the sale had occurred, albeit "in error."

This policy highlights the OCC's broader promotion of foreclosures over loss mitigation. The consent orders only call for a stop to a foreclosure where a homeowner already has obtained a modification. As described above, this turns the whole notion of ending dual track on its head.[19] Modification reviews will be faster and more accurate, and modifications will be more affordable and easier to obtain for homeowners, if the foreclosure process stops during modification reviews. In contrast to that approach, implemented in HAMP,[20] the OCC has now expanded its prioritization of foreclosures over loss mitigation into the foreclosure reviews currently underway.[21]

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[19] *See* II.

[20] HAMP requires that loan modification reviews, or significant outreach, occur before a foreclosure is initiated and that no foreclosure sale happen while a review is pending. HAMP unfortunatel does not require a full stop to a foreclosure once it has been initiated, only a halt to the sale.

[21] Adding insult to injury, the OCC continues to describe its policy as addressing "dual track," while perpetuating the exact harm that occurs when foreclosure and loss mitigation are parallel rather than serial.

Homeowners should be guaranteed that their homes will not be sold at foreclosure while their files are being reviewed. This policy should be mandated and enforced by the agencies and made transparent to homeowners. Additionally, homeowners seeking modifications may be subject to wrongful foreclosure because the consent orders and reviews do not require that modifications be provided, even where appropriate and money-saving for investors, only that evaluations be done. Moreover, modification reviews appear to be explicitly required only for junior liens.[22]

B. Outreach to Homeowners Is Fatally Flawed

Outreach to homeowners began directly on November 1, 2011, with press releases released by the OCC and the FRB and letters sent to homeowners (at least those who are still in their homes). Problems with this process include the form itself, which is complex, misleading and intimidating, the limited outreach being done, the short time frame, language access issues, barriers to participation for homeowners with counselor or attorney representatives, and concerns about adverse consequences from participating. A copy of the letter and application form is attached as Exhibit A. This process is broken. Such a travesty cannot be allowed to continue.

Homeowners' advocates cannot access the forms. We have received reports that counselors and others working with homeowners cannot obtain access to the forms. Getting third party authorizations processed to allow that access has been difficult. No apparent effort has been made to facilitate this process.

The outreach materials are not readable. Both the cover letter and the form appear to have been written by lawyers for lawyers. An analysis of the documents under the Flesch-Kincaid grade level test indicates that both are written at an intermediate college reading level. (Indeed, because the form and letter consist of relatively short paragraphs, the Flesch-Kincaid grade level test

[22] Office of the Comptroller of the Currency, *Interim Status Report: Foreclosure-Related Consent Orders* 10-11 (Nov. 2011).

may actually overstate the readability of the form and letter).[23] Best practices require outreach materials written at no more than an eighth grade reading level.

Homeowners are likely to mistake the outreach materials for a foreclosure rescue scam. The outreach materials refer consumers to "IndependentForeclosureReview.com." The name, "independent foreclosure review," sounds like something dreamed up by a foreclosure rescue scammer. Indeed, SIG TARP, the CFPB, and Treasury have recently reminded consumers to be wary of unknown organizations that contact them, promising help in obtaining a modification.[24] The dot com website address is another red flag. Information about the servicer and the government oversight is buried in the body of the text. Neither the consultants hired by servicers nor Rust Consulting, the firm engaged by the OCC to oversee the outreach, are known entities to homeowners or their advocates. The multiplicity of private consultants involved raise further skepticism: surely the servicer, the consultant hired by the servicer, and Rust Consulting cannot all be legitimate sources of information? The lack of transparency and accountability increases consumer mistrust.

The OCC FAQ is misleading. For example, the OCC FAQ says that the claims process accords "additional rights." According to the FAQ, homeowners may still pursue other forms of legal action.[25] Yet the OCC has failed and refused to forbid waiver of legal rights. Servicers, in fact, are free to prevent homeowners from enforcing any claims.[26]

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[23] According to our run of Microsoft Word's grammar check tool, the Flesch-Kincaid grade score is 14.2 for the OCC's cover letter and 13.5 for the form.
[24] Consumer Fraud Alert: Tips for Avoiding Mortgage Modification Scams, http://www.sigtarp.gov/pdf/Consumer_Fraud_Alert.pdf.
[25] *See* Office of the Comptroller of Currency, Frequently Asked Questions Regarding the Interagency Foreclosure Enforcement Actions, "Can I contest the remedy I am given?" (Nov. 22, 2011), http://www.occ.treas.gov/topics/consumer-protection/foreclosure-prevention/foreclosure-faqs.html.
[26] *See* III.E.

The discussion of financial injury is confusing and misleading. The FAQ, the letter, and the form all have a limited list of examples of how financial injury is defined.[27] Homeowners are unlikely to know the answers to technical questions, such as if their amounts due were calculated correctly. Homeowners are not told that they will be reviewed only for those injuries they identify or that they can obtain a general review by not specifying any financial injury. This perverse process penalizes homeowners who make a good faith attempt to identify the financial injury they suffered and encourages an arbitrarily narrow review.

The required certification will chill homeowner participation. Section 4 of the application form requires the homeowner to certify that all the information is truthful, and that "knowingly submitting false information may constitute fraud." Homeowners are unlikely to have the information or skills to determine, for example, whether "fees charged . . . were inaccurately calculated, processed, or applied."[28] The servicers' sloppy documentation,[29] the limited information provided most homeowners,[30] and the difficulty of interpreting even the information that is provided make it difficult for consumers to know what those charges are, and whether or not they are legitimate.[31]

Homeowners are also asked to certify they understand that they can "separately submit 'a qualified written request' relating to the servicing" of their mortgage under the Real Estate Settlement Procedures Act, that the independent review agent is not authorized "to act as an agent

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[27] *See generally* III.C.

[28] *See* OCC Request for Review Form at 1, attached as Exhibit A.

[29] *See, e.g., In re* Nosek, 363 B.R. 643 (Bankr. D. Mass. 2007) (detailing failure of servicer to account for borrower's payments); *In re* Gorshtein, 285 B.R. 118 (Bankr. S.D. N.Y. 2002) (rejecting servicers' "dog ate my homework" excuses for faulty accounting that led to certification of default by homeowners when there was none).

[30] *See, e.g.,* Maxwell v. Fairbanks Cap. Corp.,(*In re* Maxwell), 281 B.R. 101 (Bankr. D. Mass. 2002) (reporting limited information provided homeowner, housing counselor, and homeowner's attorney over two year period, such that it was impossible for the homeowner to determine the payoff amount; finding that the servicer "repeatedly fabricated the amount" due).

[31] *See, e.g., In re* Stewart, 391 B.R. 327 (Bankr. E.D. La. 2008) (determining that broker price opinion fees were overcharged, performed on the wrong property, and not reviewed by the servicer).

to receive a 'qualified written request' on behalf of [the] servicer," and that a "qualified written request" must be submitted separately to their servicer at a special address. Very few people in this country could honestly certify that they understand that.

The outreach is limited. Required forms are available only in English and assistance is only available in Spanish and English. The media used for outreach may not reach communities of color.

The OCC requires the use of paper documents, complicating document tracking and mandating delay. The form is only available by mail; there is no mechanism for homeowners to submit the review request or supporting documentation electronically. The servicers' inability to keep track of paper documents has undermined the best loss mitigation efforts. The OCC, in implementing the foreclosure review process, has deliberately ignored existing best practices.

The time to submit claims is compressed. All claims must be submitted by April 30, 2012. This gives five months only for outreach and claims submission. Experience with EHLP and HAMP demonstrates that this is insufficient time.

Many of these problems could have been avoided if the outreach process had been vetted with groups that deal with homeowners regularly.

C. The Foreclosure Review Contracts and Materials Omit Many Typical Types of Harm, Steering Homeowners to a Narrow Review

The consent orders and the documents connected with the foreclosure reviews take a constricted view of the harm caused by servicer abuses. They fail to cover all foreseeable economic damage in the definition of financial injury and omit common examples of significant financial harm to consumers. The claim form itself is confusing and suggests that the definition of financial harm is even more limited than it is. Because the process places the burden on homeowners to identify

the harm, these omissions will likely result in inadequate compensation for homeowners. Such an outcome will be compounded if a homeowner is required to waive legal rights in exchange for the weak remedy.

The engagement letter released by the OCC contains the most detailed information we have as to the applicable definition of financial harm. This detailed list of twenty-two scenarios, attached as Exhibit B, omits the most common types of financial injury caused by servicer malfeasance in the foreclosure process. For example, servicer delays are widespread. Almost 89% of housing counselor in a national survey report that servicer processing delays are the most common barrier to obtaining a modification.[32] Servicer delays in processing and approving a modification cost homeowners thousands of dollars in additional interest and fees that is then rolled into the principal balance.

- In one case from Wisconsin, a servicer's two year delay in converting a temporary modification to a permanent modification resulted in additional interest charged to the homeowner of nearly $43,000.
- A New York family, upon finally receiving an offer for a permanent modification, found themselves faced with a bill for over $9000 in foreclosure related fees and costs.
- A Brooklyn homeowner's principal balance more than tripled, mostly due to the imposition of fees and costs, in the three years her servicer delayed in resolving a wrongful foreclosure after she attempted to pay off her loan.

Nor does the list provided in the engagement letter include the cost of being placed improperly in a proprietary modification and thus losing the benefits of HAMP, including the homeowner incentive payments. Similarly, while some review documents suggest that the difference in payments between a more expensive modification and the one the homeowner qualified for should count as financial injury, this is not among the examples listed in the engagement letter.

[32] National Housing Resource Ctr Survey, Dec. 2011.

More fundamentally, nothing in the materials suggests that financial injury will be measured broadly enough to compensate homeowners for all economic injury. For example, HAMP modifications have significantly lower redefault rates than similar proprietary modifications.[33] The increased risk of redefault is a quantifiable economic harm, but it does not appear compensable under the OCC metric.

The focus is on financial harm writ narrowly. No provision is made for any of the foreseeable consequences of a wrongful foreclosure. The cost of credit and insurance are driven by credit scores: a wrongful foreclosure can easily cost a homeowner thousands of dollars annually just on these two fronts. Employers and landlords also both rely on credit scores; a wrongful foreclosure can result in lost jobs and difficulty locating alternative housing. Homeowners spend time and money trying to unravel wrongful foreclosures: the need to send notarized documents by overnight mail repeatedly to the servicer by itself can result in hundreds of dollars of out-of-pocket expenses. Children who suffer dislocation due to foreclosure may lose educational opportunities and experience poor health. Families are often torn apart by a foreclosure; no compensation is offered for any of the psychological and social damage done by a wrongful foreclosure. This narrow definition of financial harm is at conflict with long settled and well-established rules about available damages and undermines homeowners' rights.[34] It will leave many homeowners uncompensated for harm they have suffered at the servicers' hands.

Worse, the shrunken definition of financial injury may result in many homeowners being unable to pursue their claims for full compensation from the servicer elsewhere. This result could happen

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[33] *See* Office of the Comptroller of the Currency, *OCC Mortgage Metrics Report: Disclosure of National Bank and Federal Thrift Mortgage Loan Data, Second Quarter 2011*, 40 (June 2009)

[34] *See, e.g.*, DeGolyer v. Green Tree Servicing, L.L.C., 662 S.E.2d 141 (Ga. Ct. App. 2008) (holding that former homeowner may maintain claim for mental anguish as well as other damages in action for wrongful foreclosure).

either because the servicers demand explicit waivers or because courts or other agencies defer to the OCC's cramped definition of harm. Unless homeowners remain free to pursue claims against the servicer for a wider array of damages, homeowners will be left uncompensated by this process and without redress against the servicer.

The agencies have not protected homeowners' rights to bring these claims outside of the foreclosure review process. If the servicers require waiver of homeowners' legal rights in exchange for limited relief under the settlement, as they may in order to protect their own interests, the financial injury occasioned by the consent orders could far exceed the compensated financial injury under the consent orders.

The homeowner claim form takes an even narrower view of what constitutes financial harm. Instead of the twenty-two non-exclusive scenarios listed in the engagement letters from the OCC, , the homeowner claim form lists a bare twelve categories, with a final question permitting homeowners to list other ways they were financially injured. Homeowners are not offered guidance as to whether they should check all the applicable boxes. Indeed, the section on the form for identifying the financial harm is described as "background," downplaying its importance. The more prominent "examples" of financial harm listed on the first page of the form imply an even narrower range of harms under review. The examples are all focused on completed sales, complicated calculations, or express protections for servicemembers or homeowners in bankruptcy. Many homeowners who have been financially harmed fall outside of these categories.

The process leaves the burden on the homeowner to identify compensable harm, without much guidance. Homeowners will often not know whether or not the fees charged were illegal. They are unlikely to have full access to the servicer's records. Few homeowners possess the accounting savvy

or legal expertise to identify illegal fees included in a deficiency judgment, illegal force-placed insurance, or botched escrow accounts, to give a few examples from the OCC's list. Homeowners unrepresented by counsel or a competent housing counselor (which, given the lack of funding for housing counseling or legal services, will be most homeowners completing these claims forms) are at the mercy of the consultants to identify the financial harm. Yet the consultants are unlikely to identify financial injury not specified by the homeowner. The consultants will only review for the financial harm the homeowner identifies, unless the homeowner identifies no financial harm. If the homeowner identifies no financial harm, then, and only then, will the consultants do a general review to attempt to identify the financial harm suffered by the consumers. Whether that more general review, by consultants with limited experience with residential mortgage files, relying on the cramped definition of financial harm promulgated by the OCC, will produce a fair and comprehensive review is an open question.

D. The Analysis of Homeowner Claims and Files Will Be Performed in a Vacuum

The review of homeowner claims and files cannot provide meaningful results. The consultants will be relying on very limited, incomplete, and biased information—the servicer databases and files, as well as internal servicer reports, which are riddled with errors and missing paperwork. The claims forms from homeowners cannot adequately supplement the servicers' files, due to the problems in the outreach process[35] and the lack of funding for assistance to homeowners by housing counselors or legal services attorneys in completing these forms. The agencies have neither required homeowner interviews nor mandated that information supplied by the homeowner be given equal weight with the servicer's records. Implicitly, the agencies have discouraged

[35] *See generally* III.B.

homeowners from providing any detailed information of servicer wrongdoing: a general review of the servicer's misconduct will only be performed when the homeowner provides no information as to the servicer's malfeasance; in order to obtain a general review of the servicer's records, then, the homeowner must remain mum as to what the homeowner knows.

The lack of information from homeowners has led to failed supervision for many years. Omitting the homeowner's perspective is like reading every third page of a novel. Nothing we now know about the consultants or their staff suggests they will have the wherewithal to supply the missing pages, or the inclination to do so.

The review process excludes homeowners while servicers retain significant control and input. Neither the agencies nor the consultants have included homeowner advocates in the design or implementation of the review. Instead, the entire program design and implementation is one-sided, filtered through the information and perspective of the servicers, if not entirely under their control. As described in a recent news report:

> After the consultants have reviewed the loan files, they will write up their findings in a report, which will be turned over to regulators and the servicer of the loan but not to the borrower. Based on that report, the servicer will put together a report of its own on how it will compensate the borrower. Once regulators approve that plan, the servicer will send the borrower the findings of the review, including details on what compensation, if any, the borrower will receive.[36]

Notably, homeowners may not even then be informed as to what rights they will be asked to waive in exchange for limited compensation. Homeowners in this process are left entirely dependent on the servicers' munificence.

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[36] Paul Kiel, *Flaws Jeopardize New Attempt to Help Homeowners,* Pro Publica, Nov. 4, 2011, http://www.propublica.org/article/flaws-jeopardize-new-attempt-to-help-homeowners.

The sampling process also appears to have been heavily influenced, if not completely determined, by the servicers. The sampling approaches seem to vary widely by servicer and state. Although the servicers were not allowed to "dictate" the sample sizes and segments, they were consulted in the design.[37] Indeed, the consultants' sampling design is heavily dependent on information supplied by the servicers:

> In determining sample segmentation and assessing whether particular foreclosures cases or groups of cases require higher degrees of review, the servicers will use a variety of information available from the servicers. Such information includes internal reports or reviews, as well as information obtained through litigation or other means, that identified credible evidence of error, misrepresentations, or other deficiencies with the potential to cause financial injury.[38]

One wonders who determines what "credible evidence" of financial harm is: could it be that the consultants and the OCC are relying on servicers to identify the evidence of the servicers' own wrongdoing? The OCC's approach ignores the history under HAMP, where compliance officials have reported that they routinely receive no more than 50% of the documents and information they request from the servicer.[39] The servicers should not be in the position of gatekeeper when their own compliance is at stake. [40]

Finally, consulting firms who come to this review primarily with an industry-oriented point of view and a business model reliant on repeat engagements from the very servicers for whom they are doing reviews are unlikely to discern, or have an incentive to discern, the types of noncompliance intended to be discovered by the process. Typical problems that homeowners and their advocates see with HAMP noncompliance or fee abuses are unlikely to be apparent without

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[37] Office of the Comptroller of the Currency, Interim Status Report: Foreclosure-Related Consent Orders 9 (Nov. 2011)
[38] Office of the Comptroller of the Currency, Interim Status Report: Foreclosure-Related Consent Orders 9 (Nov. 2011)
[39] Paul Kiel, *Secret Docs Show Foreclosure Watchdog Doesn't Bark or Bite*, ProPublica, Oct. 4, 2011, http://www.propublica.org/article/secret-docs-on-foreclosure-watchdog/single.
[40] *See* Francine McKenna, *OCC Foreclosure Review Disclosures Still Disappoint*, Am. Banker, Dec. 6, 2011 (noting that many of the servicers assert attorney-client privilege in the engagement letters with the independent consultants).

proper training or consultation. Although some common servicer errors, like income calculation,[41] should be ascertainable by the consultants, the history of HAMP oversight is not promising. For example, Treasury found that Freddie Mac's first reviews of servicers under HAMP were "inconsistent and incomplete."[42] Even later reviews by Freddie accepted impermissible reasons for denial under HAMP.[43] If Freddie, which was involved in the design of HAMP from its inception, fails to recognize improper loan modification denials under HAMP, industry consultants with limited HAMP experience are likely to make many more mistakes.

Many of the common, improper reasons for denial require substantial, specialized expertise to identify. Some examples that cost homeowners significant money include baseless claims that the investor will not allow a modification, improper NPV analyses, and failure to provide a modification to divorced spouses and surviving family members in contravention of the Garn St Germain Act.

- A servicer represented to a California attorney that a pooling and servicing agreement forbade all modifications, when, in fact, the Pooling and Servicing Agreement specifically provided for modifications in the event of the borrower's default. The servicer epresentative in that case went so far as to provide the homeowner's attorney with an electronic copy of the relevant sections of the PSA from which the clause permitting modifications in default had been excised and a comma replaced with a period.
- After over a year and involvement of an attorney, one Ohio homeowner found out that his loan modification had been denied because the servicer had used the wrong property value in calculating the NPV test. Instead of using the value elsewhere reflected in their servicing records, the servicer used a value much higher than the property's actual value, which made it look, falsely, like the investor would profit more from a foreclosure than a loan modification.

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[41] Making Home Affordable Program Performance Report through July 2011, at 19-38 (describing rates of income calculation error at several servicers). The core question when a homeowner applies for a loan modification is whether current income makes the current loan terms unaffordable and whether that same income can support a modified payment. Improper income calculations thus can wrongfully deny homeowners access to the only help available and thus result in unnecessary home loss.

[42] Paul Kiel, *Secret Docs Show Foreclosure Watchdog Doesn't Bark or Bite*, ProPublica, Oct. 4, 2011, http://www.propublica.org/article/secret-docs-on-foreclosure-watchdog/single.

[43] Paul Kiel, *Secret Docs Show Foreclosure Watchdog Doesn't Bark or Bite*, ProPublica, Oct. 4, 2011, http://www.propublica.org/article/secret-docs-on-foreclosure-watchdog/single.

- One California advocate reports that his client submitted his wife's death certificate no fewer than six times before the servicer processed the widower's application for a loan modification.

None of these errors are simple to identify, even by industry participants with long experience. Recent job postings for personnel to conduct these reviews only decrease confidence in this process; the consultants are not hiring staff with the credentials and experience to identify adequately the harm.[44]

Without truly independent consultants, who have access to deep expertise on loan modifications and full, detailed information from homeowners, the foreclosure review process is unlikely to produce meaningful results or even minimally acceptable accuracy in its conclusions. Moreover, this process papers over problems endemic to the servicing industry—sheltering servicers from accountability while giving the appearance that justice has been done.

E. Remedies Likely Will Compromise Homeowner Rights While Providing Uncertain and Inadequate Compensation

A process that begins with limited, confusing, and misleading outreach, proceeds through a narrow approach to finding and defining harm, and concludes with a one-sided review of partial information cannot produce meaningful remedies. Accordingly, this process is unlikely to provide widespread redress for servicer foreclosure abuses. Too few homeowners are likely to submit claims and those who do are unlikely to have enough information to be able to adequately describe harm they may have actually suffered. Reliance on servicer paperwork without consumer interviews will further foreclose opportunities for a meaningful review. For homeowners considering taking the time and trouble to submit a claim, there are two key questions: what is the possible cost and what is the possible benefit? The agencies have steadfastly refused to answer these questions.

[44] *See* Adam Levitin, Robosigning 2.0: Mortgage Foreclosure File Reviewers, Credit Slips Blog, Oct. 9, 2011, http://www.creditslips.org/creditslips/2011/10/robosigning2.html#more.

Without full transparency from the agencies, homeowners and their advocates cannot reliably assess the risk of participating in this process. However, there are at least two ways that participating in this process could harm homeowners. Nothing in the process as currently designed protects homeowners from the servicers using the foreclosure reviews to scam homeowners into unwittingly surrendering their rights or personal information that the servicer could use against them.

First, the servicer could use the updated contact information to collect an otherwise uncollectible deficiency judgment. Homeowners are given no assurance that information they give to the consultants will not be used against them by the servicers. Instead, for the chance of getting some uncertain potential benefit they are asked to provide current contact information to an entity that may have already engaged in illegal collection tactics with them. Servicers should not be able to use the foreclosure review process—a process proclaimed to serve the purpose of providing compensation to wronged homeowners—to obtain collection information on homeowners. The agencies must not sanction this classic and sleazy bait-and-switch collection technique.

Second, the servicers could require that homeowners waive some or all of their current or future legal rights in exchange for receiving any compensation. The agencies have so far ceded the issue of waiver to the servicers themselves. Servicers, left to their own devices, will likely choose to impose the most expansive waiver possible. It only makes good business sense as a profit-maximizing move. Indeed, servicers have routinely sought to extract overbearing waivers from homeowners in exchange for routine loan modifications or even for the promise of a review for a

loan modification.[45] Unless the Congress or the agencies intervene, we should expect that servicers will require homeowners to waive all rights to challenge future wrongdoing by the servicer, as well as to seek additional compensation for the harm done by the servicer, regardless of how inadequate the compensation paid under the foreclosure review process is.

The failure to protect against waiver on the part of homeowners is particularly absurd when juxtaposed with the failure to stop foreclosures.[46] Homeowners are being asked to sign a blank check with respect to their rights in exchange for the possibility of receiving an undetermined amount of money, as decreed by an industry consultant hired by the servicer with little to no experience in evaluating wrongful foreclosure cases, using an undisclosed template for measuring the harm. At the same time, servicers are permitted to proceed with foreclosure, up until the moment that the same industry consultant the servicer has hired determines that the foreclosure is wrongful. Servicers are asked to surrender no rights. In fact, the foreclosure stop standard embodied in the consent orders is looser than existing guidance under HAMP and from the FHFA. In other words, the process as implemented by the OCC extends servicers' discretion at the expense of homeowners' existing rights.

A sustainable and equitable compensation scheme necessarily requires that homeowners retain their rights to protect themselves later against unsustainable loans. No homeowner should lose her right to defend herself against a foreclosure based on a small payment from the servicer. A waiver of rights will preclude homeowners from sustaining long-term homeownership in the face of continuing servicer abuses. Permitting servicers to extract waivers from homeowners is

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[45] *See, e.g., Preserving Homeownership: Progress Needed to Prevent Foreclosures : Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 111th Cong. 22 (2009) (written testimony of Diane E. Thompson, Of Counsel, Nat'l Consumer Law Center)

[46] *See generally* III.A.

fundamentally at odds with any consumer protection purpose. The OCC and FRB's failure to prohibit waivers requires transfer to an agency with a consumer protection purpose, the CFPB.

F. The Process Is Primarily Supervised By an Agency Characterized by Bias toward Lenders and Servicers over Borrowers and Homeowners

While the consent orders and foreclosure reviews are a joint regulatory effort to some extent, they are driven by the agency with the most servicers under its jurisdiction, the OCC. The OCC has released the most information on the process and was the agency that arranged to have briefings provided to stakeholders, such as housing counselors and consumer groups. (It should be noted that these briefings were carried out by an industry group, the Financial Servicers Roundtable—an approach that only raises additional questions about bias in the process.)

The OCC's record in siding with banks over consumers (and the states that seek to protect them) raises serious questions about whether the agency will promote a process that meets the needs of homeowners. From 2000 to 2004, the OCC worked with increasing aggressiveness to prevent the states from enforcing state consumer protection standards against national banks. For example, the OCC openly instructed banks that they "should contact the OCC in situations where a State official seeks to assert supervisory authority or enforcement jurisdiction over the bank,"[47] and warned states that national banks need not comply with state laws.[48] The OCC's efforts culminated in 2004, when the agency adopted a regulation preempting all state laws unless their effect on national bank powers

[47]Office of the Comptroller of the Currency, Interpretive Letter No. 957 n.2 (Jan. 27, 2003) (citing OCC Advisory Letter 2002-9 (Nov. 25, 2002)) (viewed June 19, 2009, at http://www.occ.treas.gov/interp/mar03/int957.doc , and available at 2003 OCC Ltr. LEXIS 11).

[48]*See, e.g.*, Office of the Comptroller of the Currency, Preemption Determination and Order, 68 Fed. Reg. 46,264, 46,264 (Aug. 5, 2003).

was "only incidental."[49] The regulation allows national banks to ignore state laws regarding licensing, terms of credit, disclosure and advertising, solicitations, billing, and other topics.

The OCC also asserted that the subsidiaries of national banks and federal thrifts—though they are creatures of state law, are not banks, and do not have a federal charter—can ignore state law to the same extent that their parents can.[50] The Supreme Court upheld this regulation in 2007.[51] This exercise of preemption authority by the OCC and other federal banking agencies has limited the scope of what state actors can do to contain the current crisis.

The preemption of state laws in the mortgage area by the federal agencies is a significant cause of the current crisis. Bank domination was heaviest in the most dangerous, nontraditional interest-only and payment-option adjustable rate mortgage (ARM) markets: they held 51% of the total market in 2006.[52] Though these loans were nominally made to homeowners with prime-level credit scores, the loans were toxic.[53] Overall, in 2006, national banks, federal thrifts, and their operating subsidiaries were responsible for over $700 billion of the riskiest loans.[54]

Many of the large servicers are national banks, whose primary regulator is OCC.[55] Unsurprisingly, then, many of these servicers are often unresponsive to state regulators or

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[49] 12 C.F.R. §§ 7.4007(c), 7.4008(e), 7.4009(c)(2).
[50] 12 C.F.R. § 7.4006 (OCC).
[51] Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007).
[52] Lauren Saunders, Nat'l Consumer L. Ctr., Preemption and Regulatory Reform: Restore the State's Traditional Role as "First Responder" 13 (Sept. 2009).
[53] *See, e.g.*, Allen J. Fishbein & Patrick Woodall, Consumer Federation of America, Exotic or Toxic? An Examination of the Non-Traditional Mortgage Market for Consumers and Lenders (May 2006), *available at* http://www.consumerfed.org/pdfs/Exotic_Toxic_Mortgage_Report0506.pdf; *Mortgage Lending Reform: A Comprehensive Review of the Current Mortgage System, H. Subcomm. Fin. Institutions and Consumer Credit, H. Fin. Services Comm.*, at 7-10 (Mar. 11, 2009)(statement of Margot Saunders, Of Counsel, Nat'l Consumer L. Ctr.) (describing dangers of payment-option adjustable rate mortgages).
[54] Lauren Saunders, Nat'l Consumer L. Ctr., Preemption and Regulatory Reform: Restore the State's Traditional Role as "First Responder" 13 (Sept. 2009).
[55] Six of the top ten servicers in 2009 were national banks, whose primary regulator was the Office of the Comptroller of the Currency. Those six are Bank of America, Wells Fargo, Chase, Citi, U.S. Bank, and PNC Mortgage. Numbers 11

enforcement agencies. The resulting gap demands an aggressive, consumer-oriented regulator. Unfortunately, the OCC has not demonstrated, in this process or in its history, that it is willing or able to play that role. The OCC has not been a fair broker between the interests of homeowners and banks.

The OCC's latest preemption preserving position only bolsters this conclusion. The OCC blatantly ignored Congress's directive in the Dodd-Frank Act that it can only preempt state laws if it determines, on a case-by-case basis upon a review of a particular state law, that substantial evidence on the record of the proceeding shows that a particular state law would prevent or significantly interfere with the bank's exercise of its powers. Instead, the OCC re-promulgated its sweeping preemption regulations with barely a superficial effort to comply with Dodd-Frank.[56]

The OCC's failure to make this process transparent, its unwillingness to forbid waivers, and its reliance on industry insiders and the servicers themselves all demonstrate that the OCC remains inimical to the interests of homeowners.

IV. Servicers Have Incentives to Ignore Directives to Modify Loans

The OCC continues to let the servicers drive the bus. As discussed above, the OCC neither mandates that first liens be considered for loan modifications nor that, if such loans are considered for a modification, that a modification be offered where the investors would benefit.[57] Given the weight of servicer incentives, there is no reason to believe that such a toothless rule will result in improved outcomes for either homeowners or investors. Instead, the agencies' approach will allow

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and 12 on the 2009 list, HSBC and Metlife, are also national banks. 1 Inside Mortgage Finance, The 2010 Mortgage Market Statistical Annual 174 (listing top 50 mortgage servicers in 2009).

[56] 76 Fed. Reg. 43,549 (July 21, 2011). See Comments of Consumer Organizations Regarding the OCC's Implementation of the Dodd-Frank Preemption Provisions, June 27, 2011, *available at* http://www.nclc.org/images/pdf/preemption/occ-preemption-comments-6-27-11.pdf.

[57] Office of the Comptroller of the Currency, Interim Status Report: Foreclosure-Related Consent Orders 9 (Nov. 2011). *See generally* III.A.

servicers to continue to choose for themselves a loan modification or a foreclosure, without regard to the interests of homeowners or investors.

All of the various attempts to address the foreclosure crisis have failed in part because they do not grapple with the misaligned incentives of servicers.[58] The existing incentive structure has resulted in foreclosures that are costly to both investors and homeowners, but not to servicers. Without significant enforcement mechanisms for the consent orders, servicers' incentives will continue to encourage them to proceed with a foreclosure instead of modifying the loan. This incentive structure is one reason that the dual track system, and the OCC's acquiescence in its continuance, is so pernicious.

Once a loan is in default, servicers must choose to foreclose or modify. A foreclosure guarantees the loss of future income, but a modification will also likely reduce future income, cost more in the present in staffing, and delay recovery of expenses. Moreover, the foreclosure process itself generates significant income for servicers.[59]

For servicers, the true sweet spot lies in stretching out a delinquency without either a modification or a final foreclosure sale. Income from increased default fees and payments to affiliated entities can outweigh the expense of financing advances for a long time. This nether-world status also boosts the monthly servicing fee and slows down servicers' largest non-cash expense, the amortization of mortgage servicing rights, since homeowners who are in default are unlikely to

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[58] *Cf., e.g., Alternative Mortgage Servicing Compensation Discussion Paper*, Fed. Hous. Fin. Agency (Sept. 27, 2011)(discussing problems with current servicing compensation model).

[59] A fuller treatment of servicer incentives may be found in Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755 (2011). An earlier version of this work is available at Diane E. Thompson, Nat'l Consumer L. Center, Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior (Oct. 2009), *available at* http://www.nclc.org/issues/general-mortgage-servicing-policy-analysis.html. *See also* Adam Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1 (2010).

prepay via refinancing.[60] Finally, foreclosure or modification, not delinquency by itself, usually triggers loss recognition in the pool. Waiting to foreclose or modify postpones the day of reckoning for a servicer. But delay can cost a homeowner the opportunity to obtain a modification.

Servicers have two main expenses when a loan is in default: advances of principal and interest to the trust and payments to third parties for default services, such as property inspections. Financing these costs is one of servicers' biggest expenses.[61] Recovery of these fees (but not the financing costs) is more certain and often swifter via a foreclosure than a modification. Only when a modification offers a faster recovery of advances than a foreclosure, might the financing costs incline a servicer toward a modification.[62]

A. Interest and Principal Advances to Investors

Servicers, under their agreements with investors, typically are required to continue to advance interest on loans that are delinquent.[63] Unpaid principal may or may not be advanced, depending on the PSA.[64] The requirement for advances usually continues until a foreclosure is

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[60] *See, e.g.*, Ocwen Fin. Corp., Annual Report (Form 10-K) 30 (Mar. 12, 2009):
Servicing continues to be our most profitable segment, despite absorbing the negative impact, first, of higher delinquencies and lower float balances that we have experienced because of current economic conditions and, second, of increased interest expense that resulted from our need to finance higher servicing advance balances. Lower amortization of MSRs [mortgage servicing rights] due to higher projected delinquencies and declines in both projected prepayment speeds and the average balance of MSRs offset these negative effects. As a result, income . . . improved by $52,107,000 or 42% in 2008 as compared to 2007.

[61] Ocwen Fin. Corp., Annual Report (Form 10-K) 5 (Mar. 12, 2009); Mary Kelsch, Stephanie Whited, Karen Eissner, Vincent Arscott, Fitch Ratings, Impact of Financial Condition on U.S. Residential Mortgage Servicer Ratings 2 (2007).

[62] *Cf.* Wen Hsu, Christine Yan, Roelof Slump, FitchRatings, U.S. Residential Mortgage Servicer Advance Receivables Securitization Rating Criteria 4 (Sept. 10, 2009) (finding that modifications do not appear to accelerate the rate of recovery of advances, in part because of high rates of redefault).

[63] Larry Cordell, Karen Dynan, Andreas Lehnert, Nellie Liang, & Eileen Mauskopf, Fed. Reserve Bd. Fin. & Econ. Discussion Series Div. Research & Statistical Affairs, The Incentives of Mortgage Servicers: Myths and Realities 16 (Working Paper No. 2008-46).

[64] *See, e.g.*, Ocwen Fin. Corp., *supra* note 60, at 4 (advances include principal payments); Brendan J. Keane, Moody's Investor Services, Structural Nuances in Residential MBS Transactions: Advances 4 (June 10, 1994) (stating that Countrywide was in some circumstances only advancing interest, not principal).

completed, a loan modification is reached, or the servicer determines that there is no realistic prospect of recovering the advances from either the borrower or the collateral.[65]

Servicers' advances are taken off the top, in full, at the post-foreclosure sale, before investors receive anything. [66] If advances of principal and interest payments remain beyond the sale value, servicers can usually collect them directly from the trust's bank account (or withhold them from payments to the trust).[67]

In contrast, when there is a modification, the general rule, announced repeatedly by the rating agencies, is that servicers should only recover their expenses from modifying a loan from either payments made on the modified loan or principal-only payments to the pool.[68] If servicers follow this rule,[69] it takes servicers longer to recover their advances post-modification than post-foreclosure.

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[65]Keane, *supra* note 64, at 3.

[66]Cordell et al., *supra* note 63, at 11; Ocwen Fin. Corp., *supra* note 60, at 4 (advances are "top of the waterfall" and get paid first); Wen Hsu, Christine Yan, Roelof Slump, FitchRatings, U.S. Residential Mortgage Servicer Advance Receivables Securitization Rating Criteria 1 (Sept. 10, 2009) (same); Prospectus Supplement, IndyMac, MBS, Depositor, IndyMac INDX Mortgage Loan Trust 2007-FLX5, at 71 (June 27, 2007) [hereinafter Prospectus Supplement, IndyMac et al.] (servicers repaid all advances when foreclosure is concluded); Letter from Kathy D. Patrick to Countrywide Home Loans Servicing, Oct. 18, 2010 (notifying a trust and master servicer of breaches in the master servicer's performance).

[67]*See, e.g.,* Ocwen Fin. Corp. *supra* note 60 at 11 ("[I]n the majority of cases, advances in excess of loan proceeds may be recovered from pool level proceeds."); Prospectus Supplement, IndyMac et al., *supra* note 66, at 71 (permitting principal and interest advances to be recovered from the trust's bank account); Prospectus, CWALT, INC., Depositor, Countrywide Home Loans, Seller, Countrywide Home Loans Servicing L.P., Master Servicer, Alternative Loan Trust 2005-J12, Issuer 47 (Oct. 25, 2005) (limiting right of reimbursement from trust account " to amounts received representing late recoveries of the payments for which the advances were made).

[68] *See, e.g.,* MONICA PERELMUTER, WAQAS SHAIKH & MICHAEL STOCK, STANDARD & POOR'S, CRITERIA: REVISED GUIDELINES FOR U.S. RMBS LOAN MODIFICATION AND CAPITALIZATION REIMBURSEMENT AMOUNTS 3 (Oct. 11, 2007); Jeremy Schneider & Chuye Ren, Standard & Poor's, Ratings Direct, Analysis of Loan Modifications and Servicer Reimbursements for U.S. RMBS Transactions with Senior/Subordinate Tranches (Apr. 10, 2008).

[69] Servicers have tried to bypass this rule. *See* Jeff Horwitz, *A Servicer's Alleged Conflict Raises Doubts About 'Skin in the Game' Reforms*, Am. Banker (Feb. 25, 2011).

B. Fee Advances to Third Parties

In addition to interest advances, servicers advance expenses associated with default servicing, such as title searches, drive-by inspections, or foreclosure fees.[70] Taxes and insurance costs are also often advanced.[71] Some PSAs impose caps on these fee advances.[72]

These fee advances may or may not represent actual out-of-pocket expense to the servicer. In many cases, affiliates of the servicer, not true third parties, receive the fees, and the resulting profit wipes out any cost of financing the advance.[73] These fees may also be marked up: in one case, Wells Fargo reportedly charged a homeowner $125 for a broker price opinion when its out-of-pocket expense was less than half that, $50.[74] Such padding more than offsets the cost of financing the advance. Force-placed insurance is frequently placed either through an affiliate or in exchange for a commission from the insurance company paid back to the servicer—again wiping out any true cost and turning the nominal advance into a profit center for the servicer.[75]

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[70]Cordell et al., *supra* note 63 at 17; *cf.* American Securitization Forum, Operational Guidelines for Reimbursement of Counseling Expenses in Residential Mortgage-Backed Securitizations (May 20, 2008), *available at* http://www.americansecuritization.com/uploadedFiles/ASF_Counseling_Funding_Guidelines%20_5%20_20_08.pdf (stating that payments of $150 for housing counseling for homeowners in default or at imminent risk of default should be treated as servicing advances and recoverable from the general securitization proceeds).

[71]*See, e.g.*, Ocwen Fin. Corp., *supra* note 60 at 4.

[72]Marina Walsh, *Servicing Performance in 2007*, Mortgage Banking 72 (Sept. 2008).

[73]*See* Complaint ¶ 15, Fed'l Trade Comm'n v. Countrywide Home Loans, Inc., No. CV-10-4193 (C.D. Cal. Jun. 7, 2010), *available at* http://www.ftc.gov/os/caselist/0823205/100607countrywidecmpt.pdf(alleging that Countrywide's "countercyclical diversification strategy" was built on its subsidiaries funneling the profits from marked-up default fees back to Countrywide); Peter S. Goodman, *Homeowners and Investors May Lose, But the Bank Wins*, N.Y. Times, July 30, 2009; Peter S. Goodman, *Lucrative Fees May Deter Efforts to Alter Troubled Loans*, N.Y. Times, July 30, 2009; Letter from Kathy D. Patrick to Countrywide Home Loans Servicing, Oct. 18, 2010 (notifying a trust and master servicer of breaches in the master servicer's performance). Letter from Kathy D. Patrick to Countrywide Home Loans Servicing, Oct. 18, 2010 (notifying a trust and master servicer of breaches in the master servicer's performance).

[74]*In re* Stewart, 391 B.R. 327, 346 (Bankr. E.D. La. 2008), *aff'd*, 2009 WL 2448054 (E.D. La. Aug. 7, 2009); *see also* Complaint ¶ 18, *Fed'l Trade Comm'n v. Countrywide*, *supra* note 73 (alleging a subsidiary of Countrywide routinely marked up property preservation fees by 100%); Jeff Horwitz, *Ties to Insurers Could Land Mortgage Servicers in More Trouble: Force-Placed Polices Impose Costs on Both Homeowner, Investor*, Am. Banker, Nov. 10, 2010 (reporting on fee markups in force-placed insurance).

[75] *See, e.g.*, Jeff Horwitz, Ties to Insurers Could Land Mortgage Servicers in More Trouble: Force-Placed Polices Impose Costs on Both Homeowner, Investor, Am. Banker, Nov. 10, 2010.

C. Fees Are a Profit Center for Servicers

Most PSAs permit servicers to retain fees charged delinquent homeowners. Examples of these fees include late fees[76] and fees for "default management" such as property inspections.[77] The profitability of these fees can be significant.[78] Late fees alone constitute a significant fraction of many subprime servicers' total income and profit.[79]

Servicers can collect these fees post-foreclosure before the investors receive any recovery.[80] This guaranteed recovery of fees strongly favors foreclosures over modifications that waive fees, including HAMP,[81] and encourages servicers to delay foreclosures in order to maximize the number

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[76] *See, e.g.*, Prospectus, CWALT, INC., Depositor, Countrywide Home Loans, Seller, Countrywide Home Loans Servicing L.P., Master Servicer, Alternative Loan Trust 2005-J12, Issuer 56 (Oct. 25, 2005) ("In addition, generally the master servicer or a sub-servicer will retain all prepayment charges, assumption fees and late payment charges, to the extent collected from mortgagors). *But see* Prospectus Supplement, IndyMac et al., *supra* note 66at S-11 (late payment fees are payable to a certificate holder in the securitization).

[77] *See, e.g.*, Prospectus Supplement, IndyMac et al., *supra* note 66 at S-73:

Default Management Services

In connection with the servicing of defaulted Mortgage Loans, the Servicer may perform certain default management and other similar services (including, but not limited to, appraisal services) and may act as a broker in the sale of mortgaged properties related to those Mortgage Loans. The Servicer will be entitled to reasonable compensation for providing those services, in addition to the servicing compensation described in this prospectus supplement.

[78] *See In re Stewart*, 391 B.R. 327, 343, n.34 (Bankr. E.D. La. 2008) ("While a $15.00 inspection charge might be minor in an individual case, if the 7.7 million home mortgage loans Wells Fargo services are inspected just once per year, the revenue generated will exceed $115,000,000.00."), *aff'd*, 2009 WL 2448054 (E.D. La. Aug. 7, 2009); Complaint ¶ 15, *Fed'l Trade Comm'n v. Countrywide*, *supra* note 73.

[79] *See, e.g.*, Ocwen Fin. Corp., *supra* note 60, at 34 (revenue from late charges reported as $46 million in 2008 and made up almost 18% of Ocwen's 2008 servicing income); Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers*, 15 Housing Pol'y Debate 753, 758 (2004); Gretchen Morgenson, *Dubious Fees Hit Borrowers in Foreclosures*, N.Y. Times (Nov. 6, 2007) (reporting that Countrywide received $285 million in revenue from late fees in 2006).

[80] *See, e.g.*, Prospectus Supplement, Chase Funding Loan Acquisition Trust, Mortgage Loan Asset-Backed Certificates, Series 2004-AQ1, at 34, (June 24, 2004), *available at* http://www.sec.gov/Archives/edgar/data/825309/000095011604003012/four24b5.txt ("[T]he Servicer will be entitled to deduct from related liquidation proceeds all expenses reasonably incurred in attempting to recover amounts due on defaulted loans and not yet repaid, including payments to senior henholders, legal fees and costs of legal action, real estate taxes and maintenance and preservation expenses."); Letter from Kathy D. Patrick to Countrywide Home Loans Servicing, Oct. 18, 2010 (notifying a trust and master servicer of breaches in the master servicer's performance).

[81] *See* Manuel Adelino, Kristopher Gerardi, and Paul S. Willen, Fed. Reserve Bank of Boston, Why Don't Lenders Renegotiate More Home Mortgages? Redefaults, Self-Cures, and Securitizations 6 (Public Pol'y Paper No. 09-4, July 6, 2009), *available at* http://www.bos.frb.org/economic/ppdp/2009/ppdp0904.pdf. ("In addition, the rules by which servicers are reimbursed for expenses may provide a perverse incentive to foreclose rather than modify."). Under the Department of the Treasury's Home Affordable Modification Program, servicers are required to waive unpaid late fees for eligible borrowers, but all other foreclosure related fees, including, presumably, paid late fees, remain recoverable and

of fees charged.[82] In a self-perpetuating cycle, the imposition of fees makes a foreclosure more likely, by pricing a modification out of a homeowners' reach.[83]

In addition to pre-foreclosure fees, servicers are usually entitled to recover the costs of selling the home post-foreclosure, before investors are paid.[84] The sometimes substantial fees paid to servicers in foreclosure tend to be invisible to investors.[85]

The agencies in these consent orders have not made even a superficial attempt to grapple with these misaligned incentives. Instead, the OCC proposes that servicer requirements to evaluate homeowners for loan modifications be further diminished through a process left nearly entirely to the control of the servicers.

V. The CFPB Should Have Responsibility for the Reviews and National Servicing Standards Should Be Implemented To Fill the Continuing Void in Servicing Regulation

The dismal beginning of the agencies' foreclosure review process, the questionable history of the lead agency, and the masses of unanswered questions as to whether homeowners will actually be harmed by this process inevitably point to moving the entire process over to an agency that can offer credible implementation. The CFPB, as the agency with a mandated consumer protection focus and general supervisory authority over servicers. is the obvious choice. Given the fatal flaws in the foreclosure review process, originating in the consent orders themselves, the CFPB must

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are capitalized as part of the new principal amount of the modified loan. *See* Home Affordable Modification Program, Supplemental Directive 09-01 (Apr. 6, 2009).

[82]Peter S. Goodman, *Lucrative Fees May Deter Efforts to Alter Troubled Loans*, N.Y. Times, July 30, 2009 ("So the longer borrowers remain delinquent, the greater the opportunities for these mortgage companies to extract revenue—fees for insurance, appraisals, title searches and legal services.").

[83] *See* Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121 (2008) ; *Jones v. Wells Fargo Home Mortg. (In re Jones)*, 366 B.R. 584 (Bankr. E.D. La. 2007), *aff'd Wells Fargo v. Jones*, 391 B.R. 577, 595 (diversion" of mortgage payments to cover inspection charges led to increased deficiency and imperiled bankruptcy plan).

[84]*See, e.g.*, Prospectus Supplement, IndyMac et al., *supra* note 66 at S-73 (noting that the servicer is entitled to retain the costs of managing the REO property, including the sale of the REO property).

[85]Peter S. Goodman, *Lucrative Fees May Deter Efforts to Alter Troubled Loans*, N.Y. Times, July 30, 2009.

undertake a top-to-bottom review of the entire process in order to protect consumers from harm and restore rationality to the foreclosure process at the affected servicers.

As demonstrated, the existing consent orders and foreclosure review process are inadequate to the foreclosure crisis. Even if improved, they would still not cover the entire market and their ability to protect homeowners facing foreclosure is uncertain. National servicing standards must be established so that the ongoing travesty of foreclosures without reasonable loss mitigation is replaced with a system where incentives are aligned and homeowners, communities, and investors are no longer at the mercy of servicers still focused only on lining their own pockets.

To restore rationality to our markets we must take the following steps:

- Eliminate the two-track system. Homeowners should be evaluated for a loan modification before a foreclosure is initiated or continued, and that evaluation (and offer of a loan modification, if the homeowner qualifies for a loan modification) should be completed before any foreclosure fees are incurred. Such a requirement could be imposed by legislation or by regulation.

- The failure to offer loan modifications to homeowners, where doing so is predicted to save the investor money under the Net Present Value test, must be made a clear and absolute defense to foreclosure, in both judicial and non-judicial foreclosure states.

- Net Present Value tests for modifications should be standardized and made public.

- Loan modifications for qualified homeowners facing hardship, including those in bankruptcy, should be permanent, affordable, assumable, and available without any waiver of a homeowner's legal rights. Where appropriate, principal reduction should be prioritized and available in a modification as well through bankruptcy.

- Homeowners denied a loan modification should receive a written servicer communication documenting the NPV inputs, any relevant investor restrictions and efforts to obtain an exception, and the appeal process. Appeals should be processed before a foreclosure commences or continues.

- Homeowners should be provided with access to full documentation of any investor restrictions, as well as all servicer attempts to procure a waiver, upon any denial based on investor guidelines.

- ❖ Servicers must be required to seek, and investors should be encouraged to grant, waivers of any restrictions prohibiting modifications.
- ❖ Homeowners must be provided the tools to focus servicer attention on resolving individual cases.
- ❖ Quality foreclosure mediation programs should be funded in every community to provide an opportunity to resolve disputes outside of litigation.
- ❖ Funding for legal services lawyers and housing counselors representing homeowners facing foreclosure must be increased to allow our adversarial justice system to function as designed.
- ❖ Principal reductions should be mandated where they return a net benefit to the investor and also should be permitted in bankruptcy courts.
- ❖ Fees to servicers must be limited to those both reasonable and necessary for them to carry out their legitimate activities. Default-related fees should not remain an unconstrained profit center for servicers.
- ❖ Force-placed insurance should be replaced by a default reliance on replacing or continuing the existing coverage at a reasonable price.
- ❖ Transfer notices and periodic statements should be used to increase servicing transparency.
- ❖ Application of payments and use of suspense accounts should be fair and reasonable.
- ❖ Foreclosure documentation and notice standards should be established.
- ❖ A national system for assisting unemployed homeowners should be established. The Emergency Homeowner Loan Program (EHLP) must be made permanent and properly funded and implemented.

National standards must be a floor, not a ceiling, so states can play the traditional role of legal laboratories to further protect homeowners, investors, and communities.

VI. Conclusion

Thank you for the opportunity to testify before the Subcommittee today. The foreclosure crisis continues to swell. Servicers have exacerbated the crisis, as they profit from foreclosures. The federal banking agencies overseeing the consent orders and foreclosure reviews have failed the

public and the homeowners who need assistance to stop avoidable foreclosures. As the process stands now, it threatens homeowners with the loss of legal rights without meaningful compensation. It rolls back the clock on hard-won servicing improvements under HAMP. The entire process should be moved over to the new Consumer Financial Protection Bureau. The CFPB must be given the opportunity to review this process from scratch and implement a program that is fair, honest, and accountable. National servicing standards should be established to prevent further malfeasance by the servicing industry and create a level playing field for honest actors. Together, these measures would save many homes and stabilize the market. We look forward to working with you to address the economic challenges that face our nation today.

Exhibit A: OCC Notice and Request for Review

Independent Foreclosure Review

Important Notice:
Your loan may be eligible for an Independent Foreclosure Review that may result in compensation or other remedy.
Please respond by [Month, Date, Year].

Loan Number: [XXXXXXXXXXXX]

Reference Number: [XXXXXXXXXXXX]

Property Address: [Property Address]
[Property City, State, ZIP]

[Customer 1]
[Customer 2]
[Customer 3]
[Address 1]
[Address 2]
[City], [State] [ZIP]

If you have more than one mortgage account that meets the initial criteria for an independent review, you will receive a separate notice for each. You will need to submit a separate Request For Review Form for each account.

You are receiving this notice because the above property is or was active in the foreclosure process between January 1, 2009 and December 31, 2010.

Si usted habla español, tenemos representantes que pueden asistirle en su idioma.

The Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency (federal bank regulators) have required an **Independent Foreclosure Review** to identify customers who may have been financially injured as a result of errors, misrepresentations, or other deficiencies made during the foreclosure process. [Servicer]'s records indicate that your loan may meet the initial criteria:

- Your mortgage loan was active in the foreclosure process between January 1, 2009 and December 31, 2010.
- The property was your primary residence.

If you believe that you may have been financially injured, you may submit a Request for Review Form for an **Independent Foreclosure Review** by a consultant outside of [Servicer].

The **Independent Foreclosure Review** will not have an impact on your credit report or any other options you may pursue related to your foreclosure. If you filed a complaint about the foreclosure process prior to this independent review, you are still eligible to submit a Request for Review Form.

The Review Process

Step 1: Review the enclosed Request for Review Form.
The form describes examples of situations that may have led to financial injury during the foreclosure process.

Step 2: After reviewing the form, if you believe you may have been financially injured, complete and submit a Request for Review Form describing your situation.
Return the completed form using the enclosed prepaid envelope by April 30, 2012.
You will be sent an acknowledgement letter within one week after your request is received.

Step 3: Your request will be evaluated to confirm eligibility for the Independent Foreclosure Review.
If your request meets the eligibility requirements, it will be reviewed by an independent consultant.

Step 4: Your request will be reviewed to determine if financial injury occurred because of errors, misrepresentations, or other deficiencies in the foreclosure process.
[Servicer] will provide relevant documents along with any findings and recommendations related to your request for review to the independent consultant for review. [Servicer] may be asked to clarify or confirm facts and disclose reasons for events that occurred related to the foreclosure process. You could be asked to provide additional information or documentation. Because the review process will be a thorough and complete examination of many details and documents, the review could take several months.

The **Independent Foreclosure Review** will determine if financial injury occurred as a result of errors, misrepresentations, or other deficiencies in the foreclosure process. You will receive a letter with the findings of the review and information about possible compensation or other remedy.

Your Request for Review Form must be postmarked no later than April 30, 2012.

To find answers to your questions about the review process as well as information to help you complete the Request for Review Form, visit IndependentForeclosureReview.com or call 1-XXX-XXX-XXX Monday through Friday, X a.m.–X p.m. ET or Saturday, X a.m.–X p.m. ET.

If you are currently represented by an attorney at law with respect to a foreclosure or bankruptcy case regarding this mortgage, please refer this letter to your attorney.

This notice is being sent at the direction of federal bank regulators and does not constitute an attempt to collect a debt or to impose personal liability for any obligation, including, without limitation, any obligation that was discharged, or is subject to an automatic stay in bankruptcy under Title 11 of the United States Code.

Esta información es precisa a la fecha de impresión y está sujeta a cambios sin previo aviso. Tenga en cuenta que el resto de la correspondencia, documentos legales y notas aclaratorias le serán suministrados en inglés. Le recomendamos que obtenga los servicios de un intérprete independiente para que le ayude según sus necesidades. This information is accurate as of date of printing and is subject to change without notice. All other communications, legal documents and disclosures will be provided to you in English. We recommend that you obtain the services of an independent third party interpreter to assist you as needed.

Consent Order Details

Pursuant to enforcement actions issued on April 13, 2011, [Servicer] signed a consent order with the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS) (independent bureaus of the U.S. Department of the Treasury), or the Board of Governors of the Federal Reserve System. As part of this order, the mortgage servicer has hired an independent consultant to independently review certain residential foreclosure actions regarding individual borrowers.

[Servicer] or their affiliate must make all reasonable efforts to contact potentially affected customers to alert them of their opportunity to have their foreclosure action reviewed. The review will assess whether the customer incurred financial injury and should receive compensation or other remedy due to errors, misrepresentations, or other deficiencies in the foreclosure process during the period 1/1/2009 to 12/31/2010.

FOR POSITION ONLY

Independent Foreclosure Review

Request for Review Form

It is important that you complete the form to the best of your ability; all information you provide may be useful.

If the foreclosure process was active on your primary residence between January 1, 2009 and December 31, 2010, you are eligible to request an Independent Foreclosure Review that may result in compensation or other remedy.

If you think you may have been financially injured as a result of errors, misrepresentations, or other deficiencies made during the foreclosure process, you may complete and submit a Request for Review Form.

Send this completed form to:
Independent Review Administrator
[Address, City, State ZIP]

Your form must be postmarked no later than
April 30, 2012

To find answers to your questions about the review process as well as information to help you complete the Request for Review Form, visit **IndependentForeclosureReview.com** or call **1-XXX-XXX-XXX**
Monday through Friday, X a.m.–X p.m. ET or Saturday, X a.m.–X p.m. ET

Listed below are examples of situations that may have led to financial injury. This list does not include all situations.

- The mortgage balance amount at the time of the foreclosure action was more than you actually owed
- You were doing everything the modification agreement required, but the foreclosure sale still happened
- The foreclosure action occurred while you were protected by bankruptcy
- You requested assistance/ modification, submitted complete documents on time, and were waiting for a decision when the foreclosure sale occurred
- Fees charged or mortgage payments were inaccurately calculated, processed, or applied
- The foreclosure action occurred on a mortgage that was obtained before active duty military service began and while on active duty, or within 9 months after the active duty ended

Section 1: Property information

[Servicer] Mortgage loan number: [XXXXXXXXXXX] Reference number: [XXXXXXXXXXX]	Property address: [Street Address] [City, State, ZIP]

FOR POSITIONING ONLY

Section 2: Your information

First name: Middle initial: Last name:

Address:

City: State: ZIP:

Phone (day) ☐☐☐-☐☐☐-☐☐☐☐ (evening) ☐☐☐-☐☐☐-☐☐☐☐

Email address:

PREFERRED MAILING ADDRESS AND TELEPHONE NUMBERS

This information will be used to contact you throughout the Independent Foreclosure Review process.

☐ Check here if same as above

Mailing address:

City: State: ZIP:

Phone (day) ☐☐☐-☐☐☐-☐☐☐☐ (evening) ☐☐☐-☐☐☐-☐☐☐☐

Section 3: Background

1.	Was this property your primary residence?	☐ YES ☐ NO
2.	Were you under bankruptcy protection or waiting for the final ruling on your bankruptcy case when the foreclosure action happened? If yes, date your bankruptcy case was filed: ___/___/___(if available)	☐ YES ☐ NO
3.	Do you believe that the mortgage balance amount at the time of the foreclosure action was more than the amount you actually owed on the mortgage?	☐ YES ☐ NO
4.	Do you believe that the foreclosure action was pursued because your mortgage payments were inaccurately processed or applied?	☐ YES ☐ NO
5.	Do you believe you were protected by an insurance policy issued by the servicer or an affiliate that would have made your payments in the event of unemployment, disability, or illness, but did not do so?	☐ YES ☐ NO
6.	Did you attempt through the court to have the decision to foreclose on your home reversed? If yes, court date: ___/___/___(if available)	☐ YES ☐ NO
7.	Do you believe you provided all the necessary documents required to obtain payment assistance or a mortgage modification before the foreclosure action occurred?	☐ YES ☐ NO

FOR PROPOSAL ONLY

Section 3: *continued*

8. Was a deficiency judgment obtained against you for an amount that included money that you should not have been required to pay? ☐ YES ☐ NO

9. Do you believe you were making on-time monthly payments in the required dollar amount on your mortgage or an approved loan modification, trial modification, or payment plan, yet the foreclosure action still occurred? ☐ YES ☐ NO

10. Do you believe that you were denied a modification when you qualified under the applicable program rules? ☐ YES ☐ NO

If possible, provide dates and details if you believe you were wrongly denied assistance:

_____

_____

_____

_____

_____

_____

_____

11. Do you believe you paid fees or charges that you should not have been required to pay in addition to your normally scheduled principal, interest, taxes, and insurance payments? ☐ YES ☐ NO

If possible, provide dates, types of fees or charges, and amounts you paid:

_____

_____

_____

_____

_____

_____

Important note: The questions below are specific to military servicemembers. If you or a co-borrower have not been in the military, go to question 13.

12. Did you or a co-borrower have your mortgage loan before active duty military service began? ☐ YES ☐ NO

If you responded yes to question number 12, complete the following:

Name of servicemember: _____

Date active duty began: ___/___/___

Date active duty ended: ___/___/___ OR ☐ Still on active duty as of today

FOR POSITION ONLY

Section 3: *continued*

13. Describe any other way in which you believe you may have been financially injured as a result of the mortgage foreclosure process. You may attach supporting documents.

FOR POSTAGE ONLY

Section 4: Signature

I am submitting this "Request for Review" form to request an Independent Foreclosure Review of my foreclosure action by an independent consultant. This review is being required under orders by the Office of the Comptroller of the Currency and the Federal Reserve Board to identify customers who may have been financially injured as a result of errors or other deficiencies made during the foreclosure process on their loan. The Independent Review Administrator receiving this "Request for Review" is acting pursuant to the requirements of this order.

I understand that I have the ability to separately submit a "qualified written request" relating to the servicing of my mortgage loan under the Real Estate Settlement Procedures Act. If I wish to do so, I should write separately to my servicer in accordance with the instructions below. I understand that the Independent Review Administrator is not authorized to act as an agent to receive a "qualified written request" on behalf of my servicer.

By signing this document, I certify that all the information is truthful. I understand that knowingly submitting false information may constitute fraud. I affirm that I am the borrower or co-borrower of the mortgage loan on the property noted within this document, and I am authorized by all borrower(s) to have my signature grant permission to proceed with this request for review.

Signature _____ Date _____

Print name _____

Mail this completed form to: Address
City, State, ZIP

"Qualified written request" instructions: To submit a "qualified written request," I must write separately to [Servicer name and designated QWR address], which is the exclusive address for the receipt and handling of my request.

Exhibit B: Regulator Scenarios of Financial Injury

Exhibit C - OCC and FRB Guidance - Financial Injury or Other Remediation

OCC and FRB Guidance - Financial Injury or Other Remediation

The April 13, 2011 Consent Orders require the Independent Consultants (ICs) to make certain findings in conjunction with the Foreclosure Reviews and to prepare a report of their findings ("Foreclosure Report").[2] The Consent Orders first require the IC to make a determination as to whether the servicer committed any "errors, misrepresentations, or other deficiencies" (as defined in Section II); and second, whether any such errors, misrepresentations, or other deficiencies "resulted in financial injury" to the borrower or mortgagee/owner of the mortgage loan. For this purpose, "financial injury" to the borrower or the mortgagee is defined as monetary harm directly caused by errors, misrepresentations or other deficiencies identified in the Foreclosure Review. Monetary harm does not include physical injury, pain and suffering, emotional distress or other non-financial harm or financial injury that did not result as a direct consequence of errors, misrepresentations or other deficiencies identified in the Foreclosure Review. However, financial injury does include monies actually expended by the borrower or mortgagee that directly relate to the foreclosure action, proceeding, or sale and otherwise would not have been required but for the error, misrepresentation or other deficiency by the servicer identified in the Foreclosure Review.

The Consent Orders require each institution to submit a plan, subject to approval by the OCC and/or FRB, to compensate or remediate financially injured borrowers, based on the findings contained in the IC's Foreclosure Report. While the Consent Orders contemplate compensating harmed borrowers who have suffered financial injury, the Orders also contemplate remedial action other than, or in addition to, compensation in other appropriate circumstances. As such, for each file reviewed in the Foreclosure Review, the IC must first identify (and include in the Foreclosure Report) their findings regarding any servicer error, misrepresentation, or other deficiency. The IC must then identify (and also include in the Foreclosure Report) any financial injury that has been suffered by the borrower as a result of the identified error, misrepresentation, or other deficiency and any financial injury that may be suffered by the borrower absent action by the servicer to remediate or cure the identified error, misrepresentation, or other deficiency. The IC Foreclosure Report must include recommended remediation to be made and/or compensation to be paid by the institution to borrowers who the IC has identified as having suffered financial injury or who may suffer financial injury.

[2] *See* Article VII paragraphs 3(a)-(g) and (4) for the OCC Consent Orders; Paragraphs 16(a)-(g) and 17 for the Consent Orders issued to the institutions that were previously subject to regulation by the OTS; and Paragraphs 3(a) and (b) for the FRB Consent Orders.

The following scenarios provide guidance as to what may constitute financial injury that requires compensation to the borrower or where other borrower remediation by the servicer may be required to avoid financial injury. These scenarios are not exhaustive, and should be viewed as setting forth the principles that ICs should apply when determining financial injury attributable to errors, omissions, or other deficiencies by the servicer. The IC's determination regarding the presence or absence of financial injury or whether compensation or other remediation is required must, of course, take into account and be based on the specific facts and circumstances surrounding each borrower's individual case.

I. Financial Injury Present or Other Remediation Required

Errors, misrepresentations, or other deficiencies that may result in financial injury and may require compensation to the borrower or action by the servicer to remediate or cure the error, misrepresentation, or deficiency, include the following. The OCC and FRB stress that this list is not intended to be exhaustive, but rather contains examples highlighting the principles that the ICs should use when assessing financial injury. In these examples, if a sale of the borrower's home already has occurred, the IC must determine whether the servicer should compensate the borrower for financial injury and if any other action by the servicer is required to remediate or cure the error, misrepresentation, or deficiency. If the sale has not yet occurred, the IC must also determine whether any payment to compensate for financial injury or other action by the servicer is required to remediate or cure the error, misrepresentation, or deficiency.

1) The borrower was not in default pursuant to the terms of the note and mortgage at the time the servicer initiated the foreclosure action.

2) The servicer initiated foreclosure or conducted a foreclosure sale in advance of the time allowed for foreclosure under the terms of the note and mortgage or applicable state law.

3) The borrower submitted payment to the servicer sufficient to cure the default pursuant to the terms of the note and mortgage, but the servicer returned the payment in contravention of the terms of the note or mortgage, state or federal law, or the servicer's stated policy covering payments when in default.

4) The servicer misapplied borrower payments, did not timely credit borrower payments (including failure to properly account for funds in suspense), or did not correctly calculate the amount actually due from the borrower, in contravention of the terms of the note and mortgage, state or federal law, investor requirements, or the servicer's stated policy covering application of payments.

5) The borrower paid a fee or penalty that was impermissible, as defined in Section II.

pwc

6) A deficiency judgment was obtained against the borrower that included the assessment of a fee or penalty that was impermissible, as defined in Section II.

7) The servicer placed an escrow account on the borrower's mortgage and the placement resulted in monies paid by the borrower into escrow in contravention of the terms of the note or mortgage, state or federal law, or the servicer's stated policy covering escrow accounts.

8) The servicer placed insurance on the borrower's mortgage and the placement resulted in monies paid by the borrower towards insurance in contravention of the terms of the note or mortgage, state or federal law, or the servicer's stated policy covering placed insurance.

9) The servicer miscalculated the amount due on the mortgage and secured a judgment against the borrower for an amount greater than the borrower owed.

10) A borrower's remittance of funds to a third party acting on behalf of the servicer (e.g. law firm) was not credited to the borrower's account.

11) The borrower was performing under the terms of an approved trial loan modification or an approved permanent loan modification, but the servicer proceeded to foreclosure in contravention of the terms of the modification offered by the servicer to the borrower.[3]

12) A borrower was denied a modification in contravention of the terms of the governing modification program or the servicer's stated policy covering modifications.

13) There is evidence that the borrower provided or made efforts to provide complete documentation necessary to qualify for a modification within the period such documentation was required to be provided by the governing modification program and the servicer denied the loan modification in contravention of the terms of the governing modification program or the servicer's stated policy covering modifications.

14) The servicer initiated foreclosure or completed a foreclosure sale without providing adequate notice as required under applicable state law.

[3] The requirement for the Independent Consultants, pursuant to this Guidance in connection with the Consent Order Foreclosure Review, to evaluate and make determinations regarding financial injury in circumstances where a borrower is denied a federal or proprietary loan modification is not intended to suggest that the borrower has a legal right or entitlement to receive a loan modification from the servicer.

15) The servicer foreclosed on or sold real property owned by an active military servicemember in violation of the Servicemembers Civil Relief Act (SCRA). (This provision applies to loans originated before the servicemember's active military service and prohibits foreclosures and foreclosure sales of such property at any time during the borrower's period of active military service and for 9 months thereafter, unless an exception applies pursuant to the SCRA).

16) The servicer did not lower the interest rate in accordance with the requirements of the SCRA on a mortgage loan entered into by a military servicemember, or by the servicemember and his or her spouse jointly. (This provision applies where the borrower provided written notice of military service pursuant to the SCRA for loans originated before the borrower entered into military service; the effective rate on the loan must be lowered to a rate not in excess of 6% per year during the borrower's period of military service and for 1 year thereafter, unless an exception applies pursuant to the SCRA).

17) The servicer failed to honor a borrower's bona fide efforts to redeem a sale under applicable state law during the redemption period.

18) The borrower was protected by the automatic stay under the bankruptcy code and a court had not granted a request for relief from the automatic stay or other appropriate exception under the bankruptcy code.

19) The borrower was making timely pre-petition arrearage payments required under an approved bankruptcy plan and was current with their post-petition payments.

20) The borrower: 1) purchased a borrower payment protection plan; 2) was or should have been receiving benefits under the plan; and 3) those benefits were **not applied pursuant to the contract terms**.

21) The servicer was not the proper party, or authorized to act on behalf of the proper party, under the applicable state law to foreclose on the borrower's home and this resulted in or may result in multiple foreclosure actions or proceedings.

22) The servicer failed to comply with applicable legal requirements, including those governing the form and content of affidavits, pleadings or other foreclosure-related documents (to include improperly notarized documents or the practice of "robo-signing" generally), where such failure directly contributed to: (1) the borrower paying fees, charges, or costs, or making other expenditures that otherwise would not have been paid or made; or (2) the initiation of a foreclosure action or proceeding against a borrower who

otherwise would not have met the requirements for initiating such an action or proceeding.

II. Other Definitions

"**Certain residential foreclosure actions**" – The term "certain residential foreclosure actions" means foreclosure actions initiated or completed on owner-occupied,1-4 family dwellings by divisions of the institution that process first lien mortgage foreclosures. This term includes mortgages secured by individual condominium dwelling units and individual cooperative housing units. This term also includes mobile homes, house boats, and other owner-occupied dwellings that are treated as "real estate" or "real property" under applicable state law pertaining to foreclosure.

"**Impermissible**" – The term "impermissible" as applied to a fee and/or penalty charged to a borrower's account, means a fee or penalty that is any one or more of the following:

1) Exceeds the limits established by applicable state law, federal law or the borrower's mortgage instruments, including as to type, amount, or sum of fees and/or penalties.

2) In the case of the OCC Consent Orders, is not "**reasonable and customary**," or a fee that is assessed at an "**excessive**" frequency. The term "**reasonable and customary**" as applied to a fee and/or penalty charged to a delinquent borrower's account means that institutions may only assess a fee for services actually rendered, and may only assess a fee or collect a monetary penalty that does not exceed the lesser of (a) any fee limitation or allowable amount for service under applicable state or federal law; (b) any published, pre-established fee limitation or allowable amount for the service under the guidelines for the applicable government-sponsored enterprise investing in the loan or the government agency insuring the loan; and (c) the market rate for the service (as defined under the amount or rate that is "**customarily charged in the market for such fee or penalty**" below). The term **"excessive"** means any fee that exceeds the amount permitted by the borrower's loan documents, by applicable state or federal law, or investor requirements. Excessive frequency of a fee means the same or a similar fee that is more than necessary or appropriate for completion of the underlying service.

3) In the case of the FRB Consent Orders, is "**otherwise unreasonable**." A fee or penalty is "**otherwise unreasonable**" if it was assessed: (a) for the purpose of protecting the secured party's interest in the mortgaged property, and the fee or penalty was assessed at a frequency or rate, was of a type or amount, or was for a purpose that was in fact not needed to protect the secured party's interest; (b) for

services performed and the fee charged was substantially in excess of the fair market value of the service; (c) for services performed, and the services were not actually performed; or (d) at an amount or rate that exceeds what is customarily charged in the market for such a fee or penalty, and the mortgage instruments or other documents executed by the borrower did not disclose the amount or rate that the lender or servicer would charge for such a fee or penalty.

i) A fee charged for services performed is not **"substantially in excess of the fair market value of the service"** if it exceeds by no more than 10 percent the maximum allowable fee under the "**applicable investor guide**" or, if there is no "**applicable investor guide**", the guide published by Fannie Mae or Freddie Mac that would apply if Fannie Mae or Freddie Mac were the investor.
ii) A fee or penalty does not **"exceed"** the amount or rate that is **"customarily charged in the market for such fee or penalty"** if the fee or penalty does not exceed the maximum allowable fee under the "**applicable investor guide**" or, if there is no "**applicable investor guide**", the guide published by Fannie Mae or Freddie Mac that would apply if Fannie Mae or Freddie Mac were the investor.
iii) "**Applicable investor guide**" means investor guides issued by Fannie Mae, Freddie Mac, the Veterans Administration, and the Department of Housing and Urban Development.

"**Errors, misrepresentations, or other deficiencies**." The terms "errors, misrepresentations, or other deficiencies" means those matters discovered during the Foreclosure Review as set forth in Article VII(3)(a)-(g) of the OCC's Orders, OTS Order paragraph 16(a)-(g), and Paragraphs 3(a)(i)-(vii) of the Board's Orders. "Errors" includes miscalculation of fees or other charges, where the total aggregate miscalculated fees or charges applied to the borrower exceeds $99.00.

Appendix A: Organizations on Whose Behalf Testimony Submitted

Americans for Financial Reform (AFR) is an unprecedented group of national and state organizations that have joined together to fix our financial sector and make sure it's working for all Americans.

The **California Reinvestment Coalition** (CRC) advocates for the right of low-income communities and communities of color to have fair and equal access to banking and other financial services. CRC has a membership of close to 300 nonprofit organizations and public agencies across the state of California.

Community Legal Services of Philadelphia (CLS) was created by the Philadelphia Bar Association in 1966 and is widely recognized as one of the most sophisticated, respected legal services programs in the nation.

The **Connecticut Fair Housing Center** is a statewide non-profit organization dedicated to ensuring that individual choice, and not discrimination, determines where people live in Connecticut.

Consumer Action has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change particularly in the fields of credit, banking, housing, privacy, insurance and utilities. www.consumer-action.org

Consumers Union (CU) is an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. The organization was founded in 1936.

Empire Justice Center is a New York statewide legal services organization with offices in Albany, Rochester, White Plains and Central Islip (Long Island). Empire Justice provides support and training to legal services and other community-based organizations, undertakes policy research and analysis, and engages in legislative and administrative advocacy, in addition to representing low-income individuals in a wide range of poverty law areas including consumer law. Empire Justice is a steering committee member of New Yorkers for Responsible Lending (NYRL), a statewide coalition promoting access to fair and affordable financial services and the preservation of assets for all New Yorkers and their communities

The **Financial Protection Law Center** (FPLC) is a 501c3 public interest not-for-profit law firm. It is devoted to fighting predatory lending and to defending families from foreclosure of predatory loans. FPLC is located in Wilmington, North Carolina and works throughout North Carolina and occasionally in other states.

Housing and Economic Rights Advocates (HERA) is a California statewide, not-for-profit legal service and advocacy organization. HERA's mission is to ensure that all people are protected from discrimination and economic abuses, especially in the realm of housing. We focus particularly on the needs of those who are most vulnerable, which includes lower-income people, the elderly, immigrants, people of color and people with disabilities.

The **Legal Aid Center of Southern Nevada, Inc.** is a private, non-profit (501 (c) (3)) corporation which is a charitable organization dedicated to providing free community legal services to those in need. We have been providing free legal aid for Clark County's low income residents since 1958.

The **Legal Aid Society of Milwaukee, Inc.,** was founded in 1916 "to do all things necessary for the prevention of injustice." It is one of the nation's oldest, continuously operating, public interest law firms. Each year the Society provides free legal services to 8,000 of Milwaukee's most vulnerable residents: abused and neglected children, developmentally disabled adults, persons living with HIV/AIDS, battered women, immigrants, elderly, prisoners, mentally ill, physically impaired, unemployed, and homeless – all of whom are too poor to afford legal counsel.

The **Michigan Foreclosure Task Force** represents a close to 200 members, covering a broad array of interests engaged in the front lines of foreclosure work in Michigan—from banks to legal services, housing counselors to local government. MFTF supports efforts to put resources on the front lines of the foreclosure crisis in Michigan to assist homeowners and communities battle against foreclosure, vacant homes, and falling property values.

The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

The **National Council of La Raza** (NCLR)—the largest national Hispanic civil rights and advocacy organization in the United States—works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations, NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. To achieve its mission, NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective in five key areas—assets/investments, civil rights/immigration, education,

employment and economic status, and health. In addition, it provides capacity-building assistance to its Affiliates who work at the state and local level to advance opportunities for individuals and families.

The **National Community Reinvestment Coalition** (NCRC) was formed in 1990 by national, regional, and local organizations to develop and harness the collective energies of community reinvestment organizations from across the country so as to increase the flow of private capital into traditionally underserved communities. NCRC has grown to an association of more than 600 community-based organizations that promote access to basic banking services including credit and savings, to create and sustain affordable housing, job development and vibrant communities for America's working families.

The **National Fair Housing Alliance** (NFHA), founded in 1988 and headquartered in Washington, DC, is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. Through comprehensive education, advocacy and enforcement programs, NFHA protects and promotes residential integration and equal access to apartments, houses, mortgage loans and insurance policies for all residents of the nation.

National People's Action (NPA) is a national network of grassroots organizations working to advance economic and racial justice. NPA consists of 26 organizations across the country that reaches from farmers in rural Iowa to youth in the South Bronx. NPA has affiliate organizations in 14 states with remote network offices in Washington D.C., California, New York and a central office in Chicago.

Neighborhood Economic Development Advocacy Project (NEDAP) is a resource and advocacy center that works with community groups in New York City's low and moderate income neighborhoods. NEDAP's mission is to promote community economic justice and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty. NEDAP employs multiple strategies – including community outreach and education, advocacy, policy research and analysis, and direct legal services – to ensure that communities have access to fair and affordable credit and financial services, and to address inequities in the financial services system.

The **North Carolina Justice Center** is the state's leading progressive advocacy and research organization. Its mission is to end poverty in North Carolina by ensuring that every household has access to the resources, services and fair treatment it needs to achieve economic security.

The **Woodstock Institute** is a leading nonprofit research and policy organization in the areas of fair lending, wealth creation, and financial systems reform. Woodstock Institute works locally and nationally to create a financial system in which lower-wealth persons and communities of color can safely borrow, save, and build wealth so that they can achieve economic security and community prosperity. Woodstock Institute, now based in Chicago, has been a recognized economic justice leader and bridge-builder between communities and policymakers in this field since it was founded in 1973 near Woodstock, Illinois.

PREPARED STATEMENT OF DAVID C. HOLLAND

EXECUTIVE VICE PRESIDENT, RUST CONSULTING, INC.

DECEMBER 13, 2011

Introduction

My name is David C. Holland. I am an executive vice president based in Rust Consulting's Minneapolis, Minnesota headquarters. Rust Consulting, or "Rust," has been engaged by the servicers to administer certain aspects of the Consent Orders for the Independent Mortgage Foreclosure Borrower Outreach project. Since this program's inception, we have worked closely with each of the key stakeholders—the servicers, the Independent Consultants, the Office of the Comptroller of the Currency, and the Federal Reserve Board—to ensure that the terms of the Consent Orders, as defined and detailed in our Statements of Work with each servicer, are fully carried out.

Rust provides project management, data management, notification, contact centers, claims processing, and fund distribution, typically in support of large, complex, and time-sensitive programs.

Most often, these services are provided in the context of the settlements of class action lawsuits: Rust is one of the country's largest class action settlement administrators. However, we also provide these basic services in the context of other, similar programs, such as mass torts, data breach responses, product recalls, and an assortment of public sector programs. Rust has handled approximately 3,500 programs in all.

We typically are engaged as a neutral, third party with respect to the issues behind the programs we administer: our clients include both plaintiff and defense law firms; businesses of all sizes and spanning many industries; and Government agencies at the Federal, State, and local levels.

Beginning in June 2011, we were contacted by several individual servicers regarding our interest in and capabilities with respect to this program. Throughout the summer, Rust submitted several proposals to servicers according to their own RFP processes and eventually we were engaged by all 14 servicers to serve as the single administrative provider under the Consent Orders—a decision we believe benefits borrowers as well as the parties to the Consent Orders by minimizing points of contact for all involved, streamlining processes and communications, and helping ensure consistency in all aspects of these tasks.

Responsibilities Under the OCC and FRB Consent Orders

Broadly speaking, our responsibilities under the Consent Orders are to notify borrowers about this program, to answer their questions, to receive their complaint forms, and to handle in- and out-bound mail associated with these general tasks. The content of materials involved in this process, such as request for review package and complaint forms, Web site text, and telephone scripts, was developed by or with the servicers and OCC, and is put into use only after approval of all of those parties. A more specific listing of our responsibilities includes the following.

1. Rust collaborated with the servicers to prepare different plans for various contingencies to ensure appropriate staffing or service levels across our responsibilities, *e.g.,* for staffing our call center with an appropriate number of representatives to meet various situations.
2. Rust received relevant data comprising the borrower lists from the 14 servicers.
3. Rust standardized the formatting of names and addresses of those borrowers and arranged for corrections to be made to addresses, when possible, through the National Change of Address service. Rust also performed up-front "skip-tracing" on the last known addresses for certain borrowers as noted by the servicers in their data.
4. Rust continues to oversee the printing and mailing of request for review packages to borrowers, with this mailing campaign having begun on November 1 and scheduled to conclude the series of weekly mailings on December 27. We continue to follow up with additional mailings on-request or as better addresses are received.
5. Rust has arranged for publication of media notices according to a media plan prepared by the parties. These advertisements will increase the likelihood that any borrowers who did not receive a notice via direct mail could hear of and participate in the program. These advertisements will begin running in January 2012.

6. Rust established a call center to take incoming calls from borrowers with questions about the program, their eligibility for it, or their options under it. We have been answering calls since November 1. Borrowers' requests for complaint forms may be placed through this call center, with Rust fulfilling those requests.
7. Rust established an informational Web site to provide basic information about the program to the public.
8. Rust has established separate Post Office boxes for each servicer to handle inbound mail related to the Consent Orders.
9. Upon receipt of complaint forms, Rust sends borrowers acknowledgement of receipt.
10. Rust images, data captures, and forwards submitted complaint forms to servicers and ICs.
11. To facilitate the processing of those forms that are not signed, Rust follows up with the associated borrowers by sending deficiency letters requesting they sign and resubmit their forms.
12. Rust receives and handles other inbound mail.
    - With mail sent by Rust to borrowers but returned by the U.S. Postal Service as undeliverable, Rust attempts to find better addresses and, whenever possible, to re-mail the notices to those new addresses.
    - With mail not categorized as undeliverable or as completed complaint forms, Rust processes according to agreed-upon procedures, attempting to link the information to a specific borrower and complaint file.
13. Rust provides comprehensive daily statistical reporting on the activity and service levels related to the previously listed activities to the associated parties, including the servicers, the ICs, and the OCC and the FRB.
14. Rust may be asked to follow up on complaints in some manner not yet defined, per the servicers' future needs and instructions.

PREPARED STATEMENT OF PAUL LEONARD

VICE PRESIDENT, HOUSING POLICY COUNCIL OF THE FINANCIAL SERVICES ROUNDTABLE

DECEMBER 13, 2011

Chairman Menendez, Ranking Member DeMint, and Members of the Committee, my name is Paul Leonard and I am Vice President of Government Affairs for the Housing Policy Council of the Financial Services Roundtable. I thank you for the opportunity to testify regarding the Independent Foreclosure Review process.

The goal of the reviews is to assess whether an eligible borrower incurred financial injury and should receive compensation or another remedy due to servicer errors, misrepresentations, or other deficiencies in the foreclosure process on their primary residence in 2009 and 2010. Everyone involved in this process—the residential mortgage loan servicers, consultants and the regulators—has the desire to get it right.

Importantly, these independent reviews supplement other ongoing measures the industry has underway to help identify and assist at-risk homeowners.

I would like to make five main points about the Independent Foreclosure Review effort:

- First, the reviews are designed to determine if errors in the foreclosure process caused financial injury to borrowers.
- Second, the reviews of the borrower information are independent of the servicers, as verified by the joint regulators.
- Third, the review process includes a robust outreach campaign that includes direct mail, paid advertising and other steps to reach potential eligible borrowers.
- Fourth, it will take time to receive and complete the reviews, as the outreach efforts just began November 1.
- And fifth, the information provided to the regulators on the Independent Foreclosure Reviews throughout the process is intended to be comprehensive and complete.

All involved fully appreciate the importance of this process, and are working to ensure the reviews are conducted exactly as prescribed. In this spirit, the servicers have specifically followed the direction within the consent orders. They have worked

closely with the regulators to create a consistent process for eligible borrowers to be contacted and have an opportunity for a thorough, independent review of their foreclosure case. Additionally, the servicers have added senior leadership and internal staffing to successfully execute this effort for the benefit of their respective borrowers.

Equally as important, the experience and information gained through the reviews will be used to further strengthen industry practices.

While much of the public focus has been on the outreach campaign, it is important to note that the Independent Foreclosure Review actually contains two components:

- a borrower complaint process that enables eligible borrowers who believe they may have been financially injured in the foreclosure process to request an independent review of their files, and
- a required file look-back of a valid statistical sampling of borrower accounts, including a review of 100 percent of borrowers with certain characteristics—like those who may have been eligible for protection under SCRA.

Eligible borrowers—as described previously—must meet one of four conditions during the applicable timeframe:

- Their primary residence was sold due to a foreclosure judgment.
- Their mortgage loan was referred into foreclosure, but was removed from the process because payments were brought up-to-date or the borrower entered a payment plan or modification program.
- Their mortgage loan was referred into foreclosure, but the borrower sold the home or participated in a short sale or deed-in-lieu.
- Or, their mortgage loan was referred into foreclosure, remains delinquent at this time and has not gone to foreclosure sale.

Industry-wide, the joint regulators determined that the population eligible for reviews includes about 4 million borrowers. This *does not mean* all of these borrowers were financially harmed. This is simply the total universe of borrowers eligible for review.

At the direction of the regulators and under the consent orders, a robust public education campaign to inform borrowers about the borrower complaint process has been launched. It includes direct mail, national paid advertising, and earned media. Servicers also are working to inform nonprofits and consumer advocates about the process to further help borrowers.

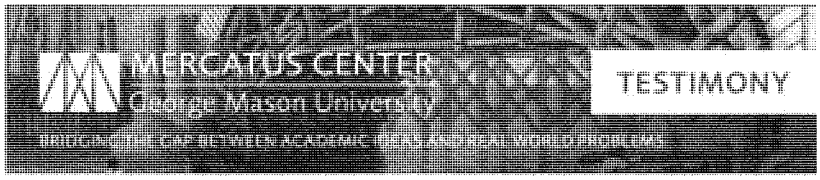
For both borrower complaints and the statistical sampling look-back, the servicers will provide the necessary files—including all data and documents—to enable the independent consultants to determine if a borrower suffered financial injury. The regulators provided 22 potential financial injury scenarios. Here are three examples:

- There is evidence that the borrower did everything the modification agreement required, but the foreclosure sale still happened.
- The servicer initiated foreclosure or completed a foreclosure sale without providing adequate notice as required under applicable State law.
- Or, inaccurate fees may have been charged or mortgage payments were inaccurately calculated, processed or applied.

The review process is underway. To ensure the process is operating effectively, senior leaders from the participating servicers and their regulators are meeting frequently—often daily—to discuss the details of what is occurring and to cooperatively institute continuous improvements in order to make the Independent Foreclosure Reviews successful. The servicers are fully cooperating with their regulators ensuring all information provided is comprehensive and complete.

This is an unprecedented undertaking that has required multiple residential mortgage loan servicers, consultants and the regulators to develop a consistent process for the review effort, while maintaining the independent nature of the reviews.

And as I mentioned earlier, it takes place alongside other important work underway to help borrowers facing financial hardships to avert foreclosure—including many borrowers who are a part of the eligible population for reviews. Ultimately, we believe these collective efforts will address concerns about the foreclosure process and will increase borrower confidence. Thank you for the opportunity to speak today and I will be glad to answer any questions you have.



HELPING HOMEOWNEERS HARMED BY FORECLOSURES: ENSURING ACCOUNTABILITY AND TRANSPARENCY IN APPEALS
DECEMBER 13, 2011

Anthony B. Sanders
Distinguished Professor of Real Estate Finance, George Mason University and Senior Scholar, Mercatus Center at George Mason University

United States Senate Committee on Banking, Housing, and Urban Affairs—Subcommittee on Housing, Transportation, and Community Development

Chairman Menendez, Ranking Member DeMint, and Members of the Subcommittee, thank you for inviting me to testify today. My name is Anthony B. Sanders. I am the Distinguished Professor of Real Estate Finance at George Mason University and senior scholar at the Mercatus Center. I was previously director of asset-backed and mortgage-backed securities research at Deutsche Bank and the co-author of "Securitization" (along with Andrew Davidson) as well as many housing finance and housing market publications.

MARKET CONDITIONS AND THE MORTGAGE MARKET

We are all painfully aware that home prices declined precipitously during from its peak in 2006/2007 resulting in a 32.5% decline (see Figure 1).[1] Owner's equity in household real estate fell 53.8% from its peak in 2006 (see Figure 2). While house prices are actually increasing in some areas of the county, they continue to fall in western and Midwest states (See Figure 3). According to Zillow, negative equity rose to 28.6 percent of single-family homes with mortgages in the third quarter of 2011. Unemployment and partial unemployment remains horrific at 8.6% and 15.6% (see Figure 4), respectively. According to the Bureau of Labor Statistics latest employment report, 315,000 people dropped out of the labor force while 120,000 non-farm jobs were created amounting to a net job loss of around 200,000.

The combination of a recession, a catastrophic decline in house prices, and continued unemployment levels not seen since The Great Depression has resulted in a staggering number of mortgage delinquencies, defaults and foreclosures. According to a December 1, 2011 LPS report,[2] mortgage delinquencies are down nearly 30 percent from the peak while the Foreclosure Inventory is at an all-time high.[3] As of October 2011, 2.33 million loans are less than 90 days delinquent, 1.76 million loans are 90+ days delinquent, and 2.21 million loans are in the foreclosure process. This sums to 6.30 million loans delinquent or in foreclosure in October. The foreclosures rates are correlated with declines in house prices (see Figure 5) and state unemployment rates (see Figure 6). Clearly, the housing market and high unemployment rates are a drag on the economy. Households have responded by reducing debt levels (see Figure 7) as a percentage of disposable income, whether voluntary or involuntary.

One of the problems facing the U.S. and global economy is debt saturation (see Figure 8). Europe is currently drowning in debt (see Figure 9), and the U.S. has serious indebtedness problems to the point where federal debt is growing faster than our industrial production (see Figure 10). This begs an obvious question: should Congress be encouraging households to take on more debt when bankruptcy and foreclosure allows the opportunity for households to shed burdensome debt?

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[1] The 32.5% decline is according to the Case-Shiller 20 City Index. If I use the FHFA house price index, the decline was 16.6%. The FHFA index excludes jumbo mortgages and other non-agency mortgage products, so the indices vary.
[2] http://www.lpsvcs.com/LPSCorporateInformation/NewsRoom/Pages/20111201.aspx.
[3] There are significant differences between states that process foreclosures following a judicial vs. non-judicial foreclosure process. http://www.lpsvcs.com/LPSCorporateInformation/NewsRoom/Pages/20111101a.aspx.

THE REMEDIES

The remedy for the housing market collapse and high unemployment rates is twofold: 1.) economic growth and 2.) getting foreclosed properties back into the economy. However, a series of federal programs, state programs, and litigation aimed at slowing the movement of households through the foreclosure process, even when foreclosure is in the household's best interest, are slowing the housing market recovery.[4]

One such action slowing the recovery is the agreement between federal agencies (OCC, Fed, and OTS) and large mortgage servicers over alleged borrower mistreatment in the foreclosure process.[5] Servicers would hire independent consultants to review foreclosures over the past two years in an attempt to discern whether borrowers were wrongfully harmed. Based on the outcome of the review, the agencies would then determine what restitution would be provided to the borrowers, if any.

THE FORECLOSURE REVIEW

What is the magnitude of the foreclosure review? Apparently, more than four million borrowers who lost their homes to foreclosure since they defaulted on their mortgages could potentially qualify for free reviews of their cases. The audits are available to those who were living in their homes and in some stage of foreclosure during 2009 or 2010 and had mortgages serviced by one of 24 companies hired by 14 banks.

The Office of the Comptroller of the Currency (OCC) has released its Interim Status Report dated November 2011.[6] The report discloses the independent consultants for the review, and there is no reason to believe that these independent consultants will skew or shape their findings to favor the servicers. Furthermore, given the level of scrutiny on the loan modification process and foreclosures and the lender/servicers' desires to put this process behind them, I am confident that all parties will handle the review process accurately and honestly.

My concern is not with the selection of independent consultants, but with the time and costs involved in such a laborious review process relative to the expected economic assessment of harm.

In addition to reviewing foreclosures at the request of the borrowers (and certain mandatory groups), there will also be a sampling of foreclosures to detect problems. Let us suppose that 4.5 million foreclosures are reviewed, and it costs an average of $2,500 per review.[7] If all 4.5 million foreclosures were reviewed, the process would cost $11.25 billion. So, depending on the number of borrowers that ask for a "free review" and the sampling size for all foreclosures, this entire process could be quite costly to lenders/servicers.

More importantly, what would be the penalties for harm done to borrowers relative to the cost? There will likely be egregious errors (such as violations of the law including foreclosure on active duty military personnel), but I would be surprised if those violations exceed 100 instances (or less than 2/10ths of 1% of the 4.5 million foreclosures). In terms of modification errors, there are likely to be less than 50,000 instances (or 1.11% of the 4.5 million foreclosures). In terms of technical errors (such as Robosigning), it is difficult forecast how many there will be, but technical errors like robosigning should not result in any financial harm to borrowers since they would be foreclosed upon after the documentation error is correct.

Suppose that the 100 instances of egregious errors cost $150,000 in financial harm (or $1,500,000). Furthermore suppose that the 50,000 instances of modification errors cost $20,000 in financial harm (or $1 billion). This projected remediation for financial harm is $1,001,500,000 (or 8.9% of the total possible cost for the review).

Once the review is completed and the remediation for financial harm is concluded, I urge everyone to put the foreclosure issue aside and allow the market to heal itself.

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[4] For example, while an emotional drain, foreclosure allows for debt reduction and increased labor mobility since the borrower is no longer tied to the home.

[5] See http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf.

[6] http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-139a.pdf.

[7] For each loan reviewed, the range is about $1,500 to $5,000 with an average of about $2,500.

APPENDIX: FIGURES

Figure 1. The Case-Shiller 20-City Home Price Index and the FHFA House Price Index Since 2000

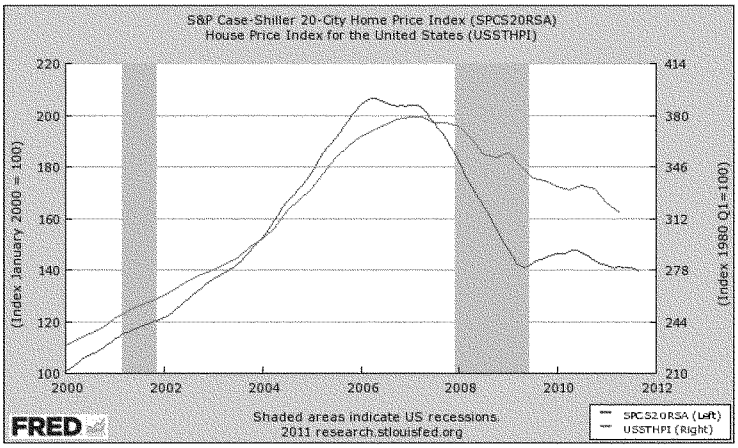


Figure 2. Owner's Equity in Household Real Estate – Net Worth

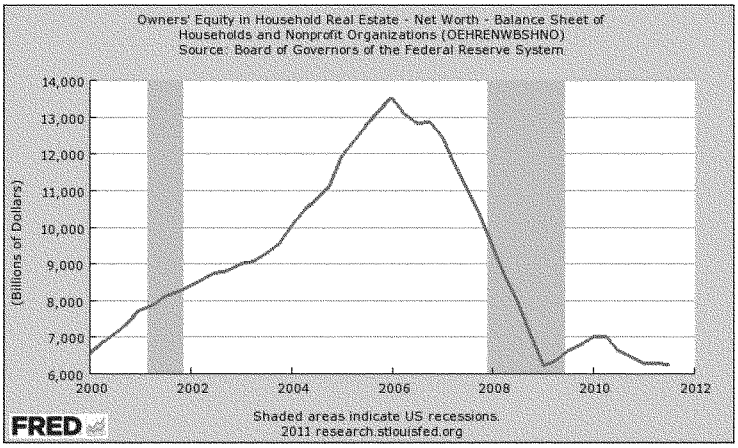


Figure 3. Recent 12 Month Change in House Prices (Including Distressed Sales)

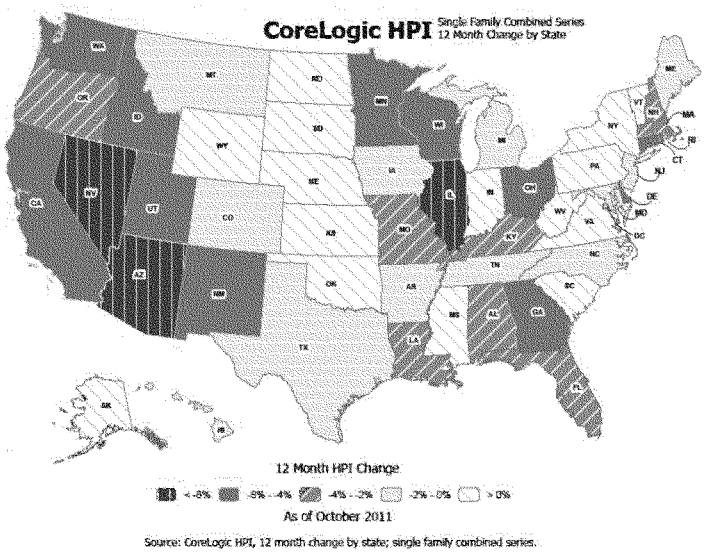


Figure 4. Civilian Unemployment and Total unemployed, plus all marginally attached workers plus total employed part time for economic reasons (U6RATE)

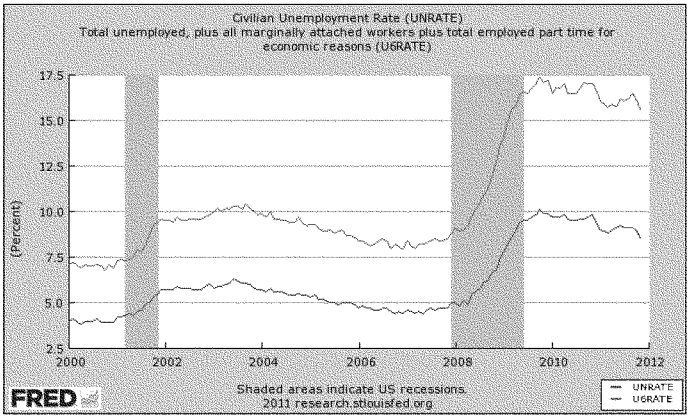


Figure 5. RealtyTrac Foreclosure Heat Map as of October 2011

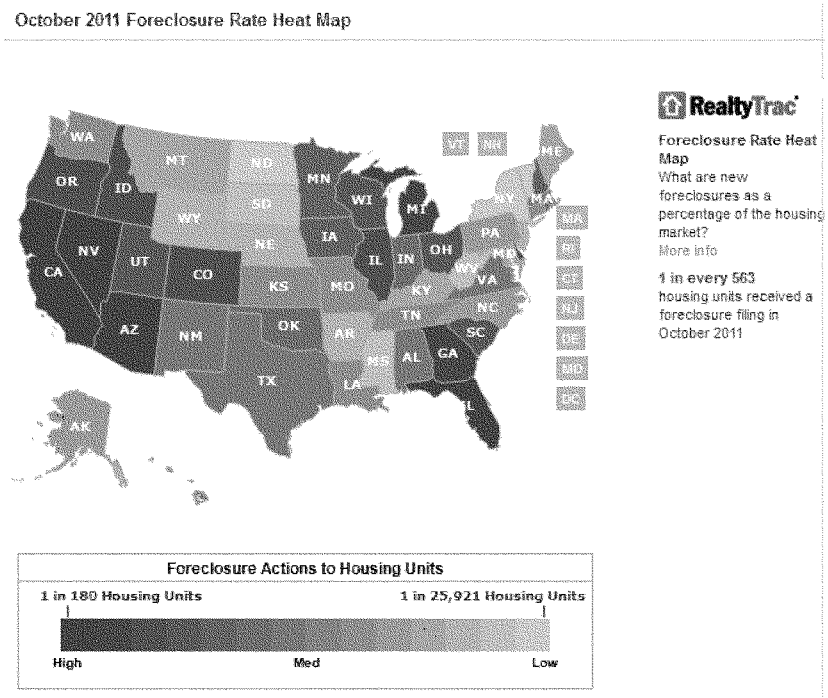


Figure 6. State Unemployment Rate

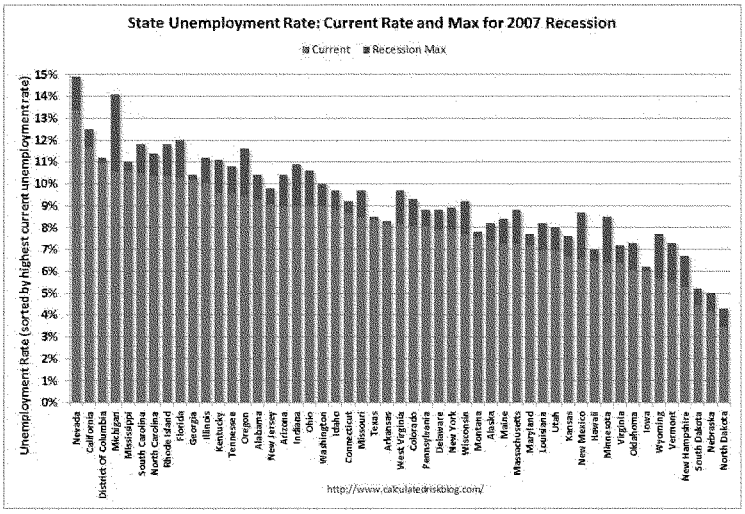


Figure 7. Household Debt Service Payments as a Percentage of Disposable Personal Income

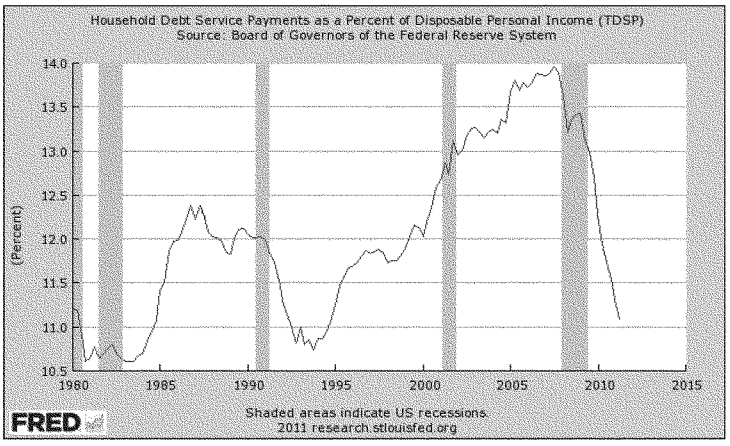


Figure 8. Global Debt as Percentage of GDP

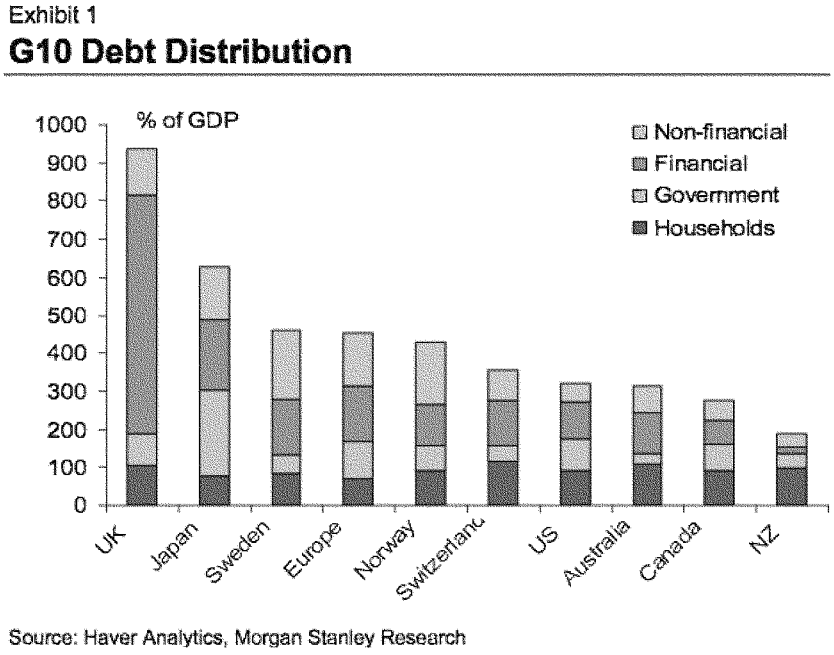


Figure 9. European Debt to GDP

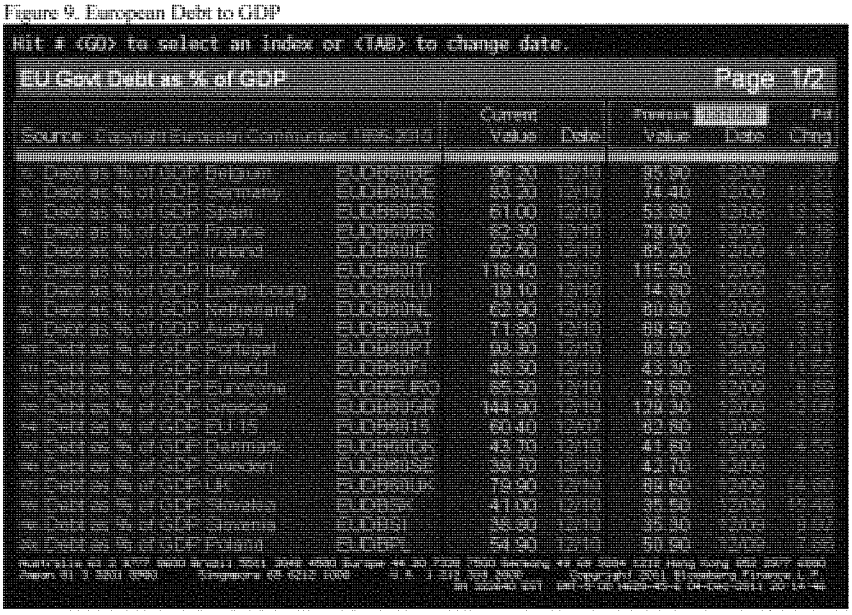
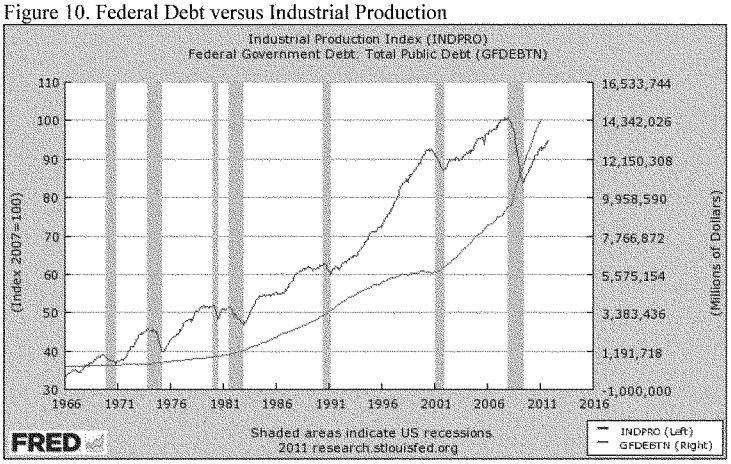


Figure 10. Federal Debt versus Industrial Production



PREPARED STATEMENT OF ANN M. KENYON

PARTNER, DELOITTE & TOUCHE LLP

DECEMBER 13, 2011

Chairman Menendez, Ranking Member DeMint, other Members of the Subcommittee, good afternoon. My name is Ann Kenyon and I lead the Securitization Advisory Group at Deloitte & Touche LLP. My experience, for over 30 years, has been in accounting and finance in both industry and public accounting. Since joining Deloitte in 1997, I have led or worked on many engagements for financial institutions, commercial clients and governmental entities with respect to their issues in dealing with the capital markets.

Deloitte & Touche LLP (Deloitte) and its affiliates have over 45,000 people in offices throughout the United States and perform professional services in four key areas—audit, financial advisory, tax and consulting.

In your invitation, you asked me to discuss "the Consent Orders that were reached by the OCC last spring with the major mortgage servicers and the foreclosure reviews that will result from them." You have heard already today directly from the Office of the Comptroller of the Currency (OCC) and will hear more from this panel on the Consent Orders and resulting foreclosure reviews.

As you know, Article VII of the OCC Consent Order creates a foreclosure review process for borrowers with residential mortgages referred to foreclosure during 2009 and 2010 (the "Review"). The Review is set forth in Article VII and is designed to determine whether, among other items:

- a foreclosure action was properly brought, particularly with respect to certain Federal and State laws;
- a foreclosure sale occurred under appropriate circumstances;
- fees and charges assessed were permissible;
- various loss mitigation programs were handled appropriately so that each borrower had an adequate opportunity to apply for such a program, any such application was handled properly, a final decision was made on a reasonable basis, and was communicated to the borrower before the foreclosure sale.

As contemplated by the Consent Order, the objective of the Review is to identify borrowers who have suffered direct financial injury as a result in any deficiencies identified in the servicer's procedures in the areas noted above.

Article VII calls for the Bank to retain an "independent consultant" to conduct "an independent review of certain residential foreclosure actions regarding individual borrowers with respect to the Bank's mortgage servicing portfolio." Deloitte serves as the independent consultant for JPMorgan Chase Bank and I am the engagement partner on that matter. As required by Article VII, the conduct of the Review is subject to the monitoring, oversight, and direction of the OCC. We have been and are meeting with the OCC regularly to keep OCC officials apprised of the details of our approach and progress.

Deloitte's engagement consists of three stages. In the first stage, Deloitte undertook the planning and coordination necessary to conduct an effective foreclosure file review as described in the Consent Order. The specific procedures to be performed by Deloitte were established based on the requirements of the Consent Order and discussions with independent counsel. The Consent Order contemplates OCC approval of the procedures proposed. As a public accounting firm, we do not practice law, so we are guided by independent counsel, retained solely to advise Deloitte in all matters requiring legal interpretation. These procedures, developed with advice of independent counsel, are generally described in Appendix E to our engagement letter, which appears on the OCC Web site in redacted form. As a result of these considerations, procedures for review of the loan files within the scope years, data gathering/sample selection processes, and project management routines were established and as indicated previously, are contained within our approved engagement letter.

Concerning data gathering/sample selection, key activities have included information gathering to support the development of the sample methodology and identification of the specific populations and sample size(s) required. In order to arrive at an effective and statistically valid sample of foreclosure files, a sampling methodology was developed that is outlined in Appendix D to our engagement letter. The goal of the sampling methodology, required by the Consent Order, is to confirm that the sample set selected for testing is representative of the characteristics of the total population from which the sample is derived, thus enabling us to produce results that achieve prescribed levels of confidence and precision. Additionally, identification of specific high risk populations of loans was done pursuant to OCC guidance,

and these populations include all borrowers who were protected under the U.S. Bankruptcy Code as well as borrowers eligible for protection under the Servicemembers Civil Relief Act.

The second stage focuses on testing of the selected foreclosure files. To execute this task, we have deployed file testing teams to review applicable foreclosure files as a basis for making appropriate recommendations for further action. Each file testing team consists of a team leader, supported by multiple file analysts and certain specialists. The file analysts will be assigned a file workload to execute against the procedures in Appendix E to our engagement letter. The analysts will conduct necessary research and will obtain additional information as necessary for each to form a sufficient basis of conclusion with respect to the results of the procedures performed. Finally, the analysts will recommend a file for further review, for possible remediation activity or closure. Throughout the process, the analysts will document the research, recommendations and basis for conclusions, and, if the analyst recommends a case for further review or for possible remediation activity, the basis for the recommendation will be documented and reported to engagement leadership. In addition, Deloitte will conduct quality assurance procedures on the work performed by our team.

Finally, the third stage consists of the review, approval, and issuance of the results of the foreclosure file testing. Among other tasks, a written report will be prepared by Deloitte and submitted to the OCC detailing the process, testing methodology followed, and results of the procedures performed by Deloitte in the Review.

Our engagement letter was approved by the OCC in September, and our work is well under way. As outlined in our engagement letter, we anticipate delivery in late 2012 of the final report based on the Review.

Additionally, and pursuant to guidance from the OCC, Deloitte has worked actively in the servicers' effort to initiate a borrower outreach program. This program, as described in Appendix C to our engagement letter, was established so that borrowers were provided a fair opportunity to file claims or complaints due to errors, misrepresentations, or other deficiencies associated with foreclosures initiated or completed during the review period. All servicers agreed to work through a single claims processing firm, Rust Consulting, with experience in setting up integrated claims processes, conducting outreach, and processing claims requests. The program was launched on November 1, 2011, and we are actively reviewing the responses that have been received thus far.

I assure you that we at Deloitte take our responsibilities as an independent consultant very seriously. We are working hard to complete the foreclosure review in a timely and effective manner so that the results of our work can be reported to the OCC as promptly as possible. I am satisfied with our progress to date and I am confident in the quality of the work performed. However, there is much more to accomplish.

I thank you for providing me with this opportunity to testify and would be happy to answer any questions you have.

PREPARED STATEMENT OF KONRAD ALT

MANAGING DIRECTOR, PROMONTORY FINANCIAL GROUP, LLC

DECEMBER 13, 2011

Good afternoon, Mr. Chairman. My name is Konrad Alt. Since 2004, I have been a Managing Director of the Promontory Financial Group, responsible for our San Francisco office. Many years ago, however, I served as counsel to the Senate Banking Committee. I am honored to be back here again today.

The independent Foreclosure Review is not the only piece, but I hope it will be an important piece, of our country's efforts to address the foreclosure crisis. Our country cannot recover from this crisis until distressed homeowners and former homeowners who have been injured by errors in the foreclosure process receive the remediation they deserve. The Foreclosure Review seeks to accomplish this goal, and my colleagues and I are mindful that our role in it brings serious responsibilities. I want to commend you, Mr. Chairman, for your leadership in addressing the foreclosure issue and advancing transparency in regard to the Foreclosure Review.

My comments here today are my own and those of my firm. They do not necessarily reflect the views of any of the financial institutions with which Promontory is working, nor those of other independent consultants. As you know, the independent Foreclosure Review grows out of a set of enforcement orders involving 15 of our country's largest mortgage servicers and 3 Federal bank regulatory agencies: the Office of the Comptroller of the Currency, the Federal Reserve Board and the

Office of Thrift Supervision, now a part of the Office of the Comptroller of the Currency. Among other requirements, these orders direct each servicer to retain an independent consultant to conduct a "Foreclosure Review" of certain residential foreclosures for the purpose of finding borrowers who incurred financial injury as a result of errors, misrepresentations, or other deficiencies in the foreclosure process, so that they can receive appropriate remediation.

Early in 2011, several of the servicers that received these orders approached Promontory about our willingness and capacity to perform the required independent review. Three of them ultimately proposed to the OCC to engage us. In reviewing their proposals, the agency requested and we provided exhaustive information concerning our credentials and potential conflicts of interest. After considering that information, the agency approved all three engagements. As a result, I now head one of our firm's review teams and help to coordinate Promontory's work in this area. Two of my colleagues head similar engagements at other institutions.

Given the millions of consumers involved, each with individual circumstances, this undertaking is complex by its very nature. Many things can go wrong with a mortgage or a foreclosure, and reviewing a particular file to ascertain what if anything did go wrong can be both difficult and time consuming. Yet an overly protracted review effort is not helpful to borrowers who have suffered or are at risk of suffering genuine financial injuries. My colleagues and I want you to know that we are working hard to do this job as fairly and effectively as possible, to the highest professional standards, and that every aspect of our work, from design to implementation to results, is fully transparent to the agencies and subject to agency examination and criticism.

Allow me to elaborate. Following approval of our retention, Promontory began to develop a methodology to meet the challenges presented by the Foreclosure Review. We developed that methodology in close consultation with regulatory examiners and subject matter experts, adapted it to the particular circumstances of the different servicers with which we are working, and detailed it in engagement letters that the regulators reviewed and commented on before authorizing their execution in September.

Our engagement letters, all of which the OCC has made public in redacted form on its Web site, make clear that Promontory works at the agency's direction. Importantly, Promontory, not the servicers, determines what information to review in each borrower's file and whether financial injury has occurred.

Our engagement letters set forth a two-pronged approach to the Foreclosure Review.

The first prong of our approach consists of a meticulous review of a large number of files. We selected a large portion of these files based on known risk factors—for example, the commencement of foreclosure proceedings after the issuance of a stay in bankruptcy—and the remainder according to well-established statistical methods. Consistent with the requirements of the consent orders, we review each of the selected files with an eye to numerous specific questions relating to compliance with applicable State and Federal laws, the reasonableness of fees and penalties, and the accuracy of servicer processing of borrower requests for loan modifications. Thus far, we have been seeking through this part of our review to gain a comprehensive and statistically rigorous understanding of the file characteristics associated with financial injury. We estimate that this effort will take our large team of analysts several months to complete. If we learn of additional file characteristics associated with financial injury, subsequent phases of work may entail further review of file population segments based on those characteristics. This could potentially lead us to review tens or even hundreds of thousands of additional files.

The second prong of our approach to the Foreclosure Review is an outreach effort, intended to afford every in-scope borrower an opportunity to request an independent review of his or her foreclosure file. Through a combination of direct mail, advertising, and free media, we are trying to let all in-scope borrowers know about the review opportunity, encourage those who believe they may have been injured by servicer actions to request a review, and give them a form to submit, along with any additional documentation they would like to provide, to help our reviewers find and focus on the borrowers' specific issues. This outreach effort launched on November 1 and is now ongoing.

The file review and outreach efforts each have strengths and weaknesses. But in combination they represent a powerful approach to accomplishing the objectives of the Foreclosure Review. If we miss any borrowers who have been financially injured in our file review effort, those borrowers still have the opportunity to bring themselves to our attention through the outreach effort. Conversely, if the outreach effort fails to reach portions of the borrower population who have been injured, we should

learn about that through the file review process and be able to take additional steps as appropriate.

The logistics of these reviews are formidable. Hundreds of professionals are working on my review team. Members of the team perform roles ranging from data entry to file review to statistical analysis, systems development, and various management responsibilities. The team includes many former bank examiners, attorneys and other professionals with relevant subject matter expertise. We have also retained our own counsel, independent of the servicer, to assist with issues of legal interpretation that arise in the course of our review. Like Promontory, our counsel faced careful regulatory review of its credentials and conflicts before we received authorization to retain them.

Quality control and quality assurance are integral to the success of this review, and we have taken care to build them into the design and execution of both the file review and outreach efforts. We conduct a mandatory training program for each reviewer. Team leads oversee the work of each reviewer and review every indication of an error in the foreclosure process. Our review processes also include extensive quality control systems and dozens of individuals with quality control responsibilities.

Further, a third group, somewhat in the nature of an internal audit function, has responsibility for Quality Assurance and reports directly to me. The Quality Assurance unit samples output from both the file review and outreach efforts to help maintain consistency and a high standard of performance across the two groups.

Mr. Chairman, our redacted engagement letters provide considerable additional detail concerning our approach to this assignment. We hope that you and your colleagues will see in that detail and in my comments here today evidence of a thoughtful, serious and professional effort—one worthy of the serious problem we are all trying to remedy. We are proud to contribute what we can to the solution, and we will do our part to the best of our individual and collective ability.

I will be pleased to try to answer any questions you or your colleagues may have for me.

RESPONSE TO WRITTEN QUESTIONS OF CHAIRMAN MENENDEZ FROM JULIE L. WILLIAMS

Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

March 9, 2012

The Honorable Tim Johnson
Chairman
Committee on Banking, Housing and Urban Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Johnson:

I am pleased to be able to respond to the written questions for the record that Committee members provided following the December 13, 2011 hearing entitled, "Helping Homeowners Harmed by Foreclosures: Ensuring Accountability and Transparency in Foreclosure Reviews."

Since that hearing, the Office of the Comptroller of the Currency (OCC) has continued to make progress on implementing our enforcement actions, and I'd like to highlight briefly a few of those areas.

- Pursuant to the enforcement actions we took in April 2011, major changes are being made to the servicing and foreclosure practices of the national banks and federal savings associations subject to those orders. The Enforcement Orders (Orders) also require the servicers to devote considerable resources to the Independent Foreclosure Review, which is designed to identify borrowers who suffered financial harm as a direct result of the practices identified in the Orders, and to provide financial remediation for that harm. Together with the Federal Reserve Board, we expect to release comprehensive guidance on standards for remediation later this month.

- One of our key concerns has been to make sure that all borrowers who were in any stage of foreclosure during 2009 and 2010 understand that they are eligible to have their case reviewed. Toward that end, we have required the servicers to develop a media plan that includes a nationwide advertising campaign targeted toward those publications most likely to reach eligible borrowers. We consulted with community and housing advocates, and incorporated many of their suggestions in expanding the media plans and revising the ads that were used. Based in part on comments from these advocates, the OCC worked with the servicers to expand their media plan to include Spanish-language placements in key markets as wells as publications serving minority populations.

- The OCC has conducted its own media outreach, including press releases, press interviews, and a public service advertisement (PSA) campaign. The PSA campaign

includes a feature article describing the Independent Foreclosure Review and two 30-second radio spots, produced in English and Spanish, distributed to more than 10,000 small print publications and 6,500 small, local radio stations. Through March 7, the PSAs have run 515 times in 29 states. The total potential combined readership and listening audiences exceeds 51 million.

- To provide additional time to increase awareness of the Independent Foreclosure Review, the OCC and the Federal Reserve on February 15 extended the deadline for requesting a review by three months, from April 30, 2012 to July 31, 2012.

- The OCC and the Federal Reserve are also facilitating educational and awareness outreach meetings with housing advocacy groups, including two nationwide webinars held for housing counselors to increase awareness of this effort.

- More than four million letters were sent to eligible borrowers who were customers of OCC-supervised institutions, and only about 5.6 percent have proven to be undeliverable. This low undeliverable rate is a result of effective efforts to identify current and accurate addresses of potentially eligible borrowers including a three-step tracing process. One of the goals of the continued media outreach and advertising campaigns is to get the word out to those who were not reached by mail. Most recently, a major national bank servicer has provided funding to 11 community organizations that will assist in reaching borrowers eligible for an independent review.

- The Independent Foreclosure Review.com Web site was significantly enhanced on March 2 to allow borrowers to complete their Request for Review forms online, which should also facilitate the filing of requests for review.

- As of March 4, 113,894 borrowers have requested an independent review of their foreclosure case, and that number will likely grow in the months ahead as a result of continued outreach and the extended deadline. In addition, nearly 136,000 files have been selected so far in the "look-back" file review required under our Orders, which means at least a quarter-million cases are currently slated to be reviewed. At present, nearly 116,000 files of national bank and federal savings association servicers are under review.

  This is a massive undertaking. After all the work we did in the OCC foreclosure process examinations in the latter part of 2010 to establish the case for our Enforcement Orders, the work of more than 100 seasoned examiners over four months resulted in actual review of 1,200 files. By comparison, the "look-back" review and coordinated claims effort required by our Orders now involve more than a quarter million cases and growing, and will require thousands of reviewers.

I hope the information provided in the responses that follow prove helpful to the Committee. If you have questions or need additional information, please contact Carrie Moore, Deputy Director for Congressional Liaison, at 202-874-4844.

Sincerely,

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

Enclosure

Q.1. How many third-party consultants were submitted by the servicers to OCC for review, and of those, how many were rejected by the OCC for conflicts of interest? Specific names are not necessary.

A.1. With respect to third-party independent consultants and independent counsel that were subject to non-objection under the April 13, 2011 Consent Orders, the OCC and OTS rejected 12 separate firms: two proposed independent consultants and 10 proposed independent counsel because they did not satisfy independence criteria (one rejected consultant was proposed under the Consent Order between the OCC and MERS). We also understand that one other consultant withdrew its name from consideration after independence concerns were raised.

Q.2. How many of the third-party consultants are currently doing other work for the servicers that is unrelated to mortgages or foreclosures? Specific names are not necessary.

A.2. With respect to the national bank and Federal savings association servicers, eight consultants have current engagements with the servicers, and four do not.

Q.3. How many of the third-party consultants formerly did other work for the servicers that was unrelated to mortgages or foreclosures? Specific names are not necessary.

A.3. Most of the independent consultants have done some work for the servicers at a previous time.

Q.4. Can the OCC extend the deadline for homeowners past April to allow more time for those who are just hearing about it through the media campaign to submit claims? If not, please specify why maintaining the April 30, 2012 deadline is necessary.

A.4. On February 15, 2012, the OCC and the Federal Reserve announced an extension of the deadline for individuals to request a review under the Independent Foreclosure Review. The new deadline is July 31, 2012, and provides an additional 3 months for borrowers to request a review. The deadline extension provides more time to increase awareness of how eligible borrowers may request a review through this process, and to encourage the broadest participation possible.

Q.5. What outcome will the OCC view as success? Will this effort be successful if 2 percent of eligible borrowers seek a review, for example?

A.5. Due to the unique nature of this process, *i.e.,* the number of borrowers who suffered financial injury within the scope of the OCC's orders is unknown, there is no ready yardstick by which to measure success based on any expected percentage of returns. The OCC is reviewing all relevant data, including the reach of borrower outreach efforts, to determine whether an effective outreach campaign was launched. The file review, which is separate from the coordinated complaint process, is an equally important part of the foreclosure review process and provides another means for identifying financially harmed borrowers. In evaluating the reach of the entire process, both efforts in combination must be considered.

Q.6. What are the fair housing implications of the review period the OCC selected (2009–2010)? The earliest loans to go through foreclosure were subprime loans, many of which were targeted to communities of color, yet those folks are left out of this review for no apparent reason. Please provide data comparing the racial statistics of homeowners who were foreclosed on during the 2009–2010 period compared to the years immediately preceding that.

A.6. The OCC review period includes all borrowers who were in any stage of the foreclosure process during 2009–2010, including "pending" foreclosures, regardless of when the foreclosure action was initiated. Thus, borrowers who started the foreclosure process in 2008 (and in some cases in 2007) whose foreclosures continued to be in process as of 2009 will be covered under the review, as well as those borrowers whose foreclosures began in 2009 and 2010 and are still in the process today.

We do not have available the statistics on the racial composition of homeowners who were foreclosed on during the 2009–2010 period, compared to the years immediately preceding that period.

Q.7. Will the OCC set up a system to collect claims requests from borrowers who were in the foreclosure process either earlier or later than their limited scope of review? What will happen to complaints that come in from borrowers whose foreclosures may have been improper, but were completed before January 1, 2009 or initiated after December 31, 2010?

A.7. The OCC foreclosure review and remediation process is being conducted pursuant to the terms of the April 13, 2011 Consent Orders and accordingly covers borrowers who had pending or completed foreclosures in the period of 2009 to 2010. Complaints submitted that are out-of-scope where the borrower has raised concerns that his or her foreclosure may have been improper can be referred to the servicer's customer complaint channels, and the borrower may also contact the OCC's Customer Assistance Group. See *www.helpwithmybank.gov,* to submit a formal complaint.

Q.8. How will the OCC ensure that all homeowners are reviewed for all financial injury, regardless of which boxes they check?

A.8. The purpose of the background questions is to assist borrowers in communicating how they believe they were financially harmed. The independent consultants will focus their review on these areas to ensure that the borrowers' specific concerns are evaluated. To the extent borrower descriptions are incomplete, inadequate or vague, independent consultants will treat such claims as a "generalized" complaint subject to a full scope review. In addition, we have instructed independent consultants that all servicer errors identified during the file review that resulted in financial injury must be remediated as appropriate.

Q.9. As Senator Reed suggested at the hearing, can the OCC request that the independent consultants report the exact nature of any engagements they have with the servicers? I request that you do that for a period of 3 years following the completion of the reviews, and that the OCC submit that information to Congress, including this Housing Subcommittee.

A.9. The OCC considered existing engagements for the firms who serve as independent consultants prior to issuing non-objections for each firm. Neither the independent consultants nor the servicers were placed on notice at the time of their engagement that they would be subject to any ongoing restrictions or monitoring with respect to *future* engagements. We also do not have generalized authority to impose reporting requirements on the independent consultants following the conclusion of their work on the foreclosure reviews. This information could be accessible to the OCC through the supervisory process; however, since it would constitute otherwise confidential supervisory information and could be considered proprietary information, we would need to further discuss if such information could be made available.

Q.10. What additional steps can the OCC mandate of servicers to improve contact rates with borrowers? What are the most effective methods of outreach so that borrowers will respond to solicitations?

A.10. As required by the OCC and the Federal Reserve, the servicers prepared an extensive national media campaign, launched last November, to advise borrowers about the Independent Foreclosure Review process and the ability to submit a Request for Review form. The OCC has also met with community and housing advocates to discuss additional potential methods to reach eligible borrowers. Based on those meetings, the OCC required that the servicers increase the scope of their media campaign to reach additional demographic groups and to make information available in additional languages other than English, which the servicers have agreed to do. The OCC also made use of its Public Service Announcement campaign in January to highlight the Independent Foreclosure Review. And as noted previously, the OCC has extended the deadline for the submission of Request for Review forms until July 31, 2012, which will provide additional time for servicers to contact borrowers. The OCC will continue to monitor return rates subsequent to the advertising launch and will make determinations whether additional media is necessary at that time.

The OCC is also encouraging servicers to provide resources to housing counselors to help make borrowers aware of the opportunity to take advantage of the Independent Foreclosure Review and, where needed, to assist those borrowers during the process. Bank of America has already funded an initiative to engage recognized HUD-approved counseling intermediaries to support enhanced outreach to customers who may be eligible for the Independent Foreclosure Review and to provide help in completing the application. The initiative supports 11 HUD-approved intermediary agencies (who are also National Foreclosure Mitigation Counseling fund recipients) and their nonprofit affiliates and is designed to support grass roots visibility to reach as many eligible customers as possible including low- and moderate-income, multicultural and those who may be experiencing language barriers. The outreach will include: mailings and outbound calling directed at customers believed to be eligible for the foreclosure review; traditional grass roots outreach events to provide information to individuals and families; and other activities designed to communicate information to the community, such as newsletters, Web sites, PSAs, and pur-

chased ads. These organizations will also manage two toll-free numbers (one aimed at Spanish speaking borrowers) and will assist borrowers in requesting and completing the Request for Review form, including assembling supplemental information and documents as necessary.

Q.11. What role will the courts play in this foreclosure review process? Are the consent orders for example approved by a court?

A.11. The OCC's Consent Orders are not subject to court approval and are issued pursuant to the OCC's enforcement authority under 12 U.S.C. § 1818. However, the OCC may file an action in the appropriate Federal district court for injunctive relief to enforce the Orders if the servicers do not comply with them.

Q.12. Why were these consent orders done under the OCC's safety and soundness powers and not under consumer protection powers? If this review process may be irreparably tainted by bias of the consultants and the entire manner in which the OCC set up these reviews, why shouldn't the Consumer Financial Protection Bureau take over this whole foreclosure review process since the primary basis for the consent orders is really consumer protection?

A.12. The deficiencies identified through the horizontal examinations of the largest national bank servicers raised serious safety and soundness issues rising to the level of unsafe and unsound banking practices. As such, it is entirely appropriate for the OCC, as the servicers' prudential regulator, to take action to ensure that those unsafe and unsound practices are promptly corrected. The jurisdiction of the Consumer Financial Protection Bureau does not include unsafe and unsound banking practices, thus it would be inappropriate for them to take over the foreclosure review process or any other aspect of the actions required to comply with the Consent Orders.

Q.13. You stated in your testimony that it has not been decided whether homeowners would have to give up their legal rights to other remedies if they apply for this program or take any money, even a small amount. Given the inherent biases of the consultants who are conducting these reviews, why should homeowners have to give up their right to have their case reviewed by a court? Unlike the consultants, the court is truly an independent third party.

A.13. With respect, we cannot concur with your statement that the consultants have "inherent biases" that will impact the independent reviews. Our experience to date with the independent consultants simply does not support that characterization.

No final decisions on the issue of releases have been made at this time by the OCC. Should any form of release be permitted, however, borrowers will always be given a choice to either accept the offer of remediation or to reject the offer and pursue their claims in alternative venues, including the courts. The issue is simply one of avoiding duplicative compensation for the same injury and achieving closure in connection with at least some issues in the mortgage/foreclosure crisis arena.

Q.14. The OCC banned the practice of proceeding with foreclosure where the bank already agreed to a loan modification with the homeowner, but why specifically did the OCC not ban the practice

of proceeding with foreclosure when the borrower had already requested a modification and the bank hasn't yet responded? Not banning the latter creates great confusion for homeowners and can easily lead to the kinds of illegal foreclosures these Consent Orders are supposed to remedy.

A.14. The OCC's Consent Orders require servicers to implement procedures under approved action plans to ensure that no further foreclosure or legal action predicate to a foreclosure occur when the borrower's loan has been approved for a trial or permanent modification, unless the borrower is in default on the terms of the trial or permanent modification. It was also contemplated under the Orders that servicers will be required to revise action plans to comply with any *higher* standards that might be required by developing national servicing standards, other negotiated settlements or contractual agreements, including those subject to the National Mortgage Settlement, or in some respects, new requirements imposed by the GSEs. It is important to recognize, however, that contractual requirements and requirements imposed by other sources will affect how new higher standards can be implemented in practice.

Q.15. Will these Consent Orders interfere in any way with the actions currently underway by the Department of Justice and State Attorneys General? The Federal Reserve and FDIC have said they do not intend to do that, am I correct that the OCC also does not intend to do that?

A.15. That is correct. For over a year, the OCC has been in close communication with Department of Justice (DOJ) officials as settlement negotiations have progressed. The Consent Orders do not interfere with the National Mortgage Settlement announced by DOJ, other Federal agencies and State Attorneys General.

Q.16. Ms. Cohen in her testimony cites several examples of harm to borrowers that are not included in your examples, such as servicer delay, the cost of being placed in a proprietary modification instead of a HAMP one, and the cost of an improperly damaged credit score. Senator Merkley also gave the example of robosigning. Will each of those four examples be treated as "financial harm" to the borrower, too? Please address each of those four examples in detail. In addition to instructing the servicers to correct the credit score, will homeowners be compensated for past financial injury occasioned by a poor credit score, such as lost employment, lost alternative housing, higher insurance and credit costs? What steps will the OCC take to ensure that credit scores are corrected in a timely way?

A.16. The OCC and the Federal Reserve have considered these examples and others as we work to formalize the financial remediation framework. As discussed above, we have contemplated how to incorporate into the framework financial injury resulting from servicer delays in processing borrower applications for loan modifications in cases where there was a requirement to process a completed application within a specified timeframe (*i.e.,* under HAMP) that was not met. The framework will also address direct financial injury resulting from a wrongful denial of a HAMP loan modification in the case where the borrower qualified for another modification but suffered financial injury as a result of the wrongful denial;

and it will address damage to credit scores resulting from servicer error. With respect to robo-signing, as discussed above, in cases where the independent consultant determines that there was direct financial injury suffered as a result of robo-signing of affidavits, then there will be remediable harm. However, the act of robo-signing alone does not in and of itself constitute direct financial injury that is compensable under the Independent Foreclosure Review.

Q.17. How will you ensure uniformity of remedies across servicers? Your reference in your testimony to "baseline" rules for compensation that didn't have to be followed by the third-party consultants was disturbing and could lead to wildly inconsistent results for similarly situated homeowners. When will you release full guidance as to how financial compensation will be calculated for borrowers?

A.17. The remediation framework currently being finalized by the OCC and the Federal Reserve will provide types and amounts of remediation expected under several scenarios. The remediation framework will assure consistency in the remediation provided to similarly situated borrowers who suffer similar injury. The remediation framework has been referred to as "baseline" standards, because if the independent consultant or servicer proposes to offer remediation above what is set forth in the framework for a particular borrower or groups of borrowers, the OCC would not object. There is also a need to provide the independent consultants with some amount of flexibility to determine whether a different type or amount of compensation may be required to address the borrower's direct financial injury under a borrower's particular circumstances. The remediation framework is expected to be released in March 2012.

Q.18. Under current policy, the OCC is directing servicers and their independent consultants to escalate the review of certain borrower claims when the borrower's home is scheduled for a near-term foreclosure sale. As I understand it, borrowers will qualify for an escalated review if their foreclosure is 30 days away (this timeframe may be extended for borrowers where the independent review may take longer to complete). Will the OCC make public the specific timetables, at each servicer, where borrowers will qualify for an escalated review? Will the OCC consider prohibiting servicers from proceeding to a foreclosure sale in certain circumstances? Can the OCC guarantee that servicers will not complete any foreclosure sales while the escalated review is still pending? Will post-foreclosure review really be sufficient to address their concerns after they've already lost their homes? I'm concerned that most homeowners will not be expecting to lose their homes while they are awaiting a decision and most will likely assume that in applying for the program their foreclosure will be stopped until the review process is over.

A.18. The OCC has issued guidance to the independent consultants and servicers to try to prevent any borrower who is receiving an independent foreclosure review from losing their home without their file first receiving an independent review or a pre-foreclosure sale review. All borrower requests and other files selected for an independent foreclosure review will be monitored on at least a weekly basis to determine if a foreclosure sale is scheduled. The

independent consultants will prioritize their review of these requests and files according to the scheduled foreclosure sales date. Additionally, servicers, subject to independent consultant testing and validation, will be required to promptly review all borrower requests for an Independent Foreclosure Review and borrower submitted documentation to determine if a scheduled foreclosure sale should be postponed, suspended or canceled. Servicers, after being notified of a borrower request for review, also must promptly determine whether the borrower is currently in an approved active loss mitigation program or is being actively considered for a HAMP or other modification or loss mitigation program and whether further foreclosure proceedings and/or scheduled foreclosure sale be postponed, suspended or canceled as required by the applicable program standards. We encourage borrowers who believe they have a basis to submit a request for review and are facing foreclosure to submit their requests as soon as possible and to also continue with their foreclosure prevention efforts directly with the servicer, since submission of the request for review form just prior to foreclosure sale may not allow for sufficient time for the above checks to be completed.

Q.19. Why hasn't the OCC already released the full guidelines (other than the approximately 22 examples) to the public for what constitutes "financial harm" to a borrower? Am I correct that a more comprehensive definition and examples could easily be released without releasing any proprietary information? When will the OCC do that? If you don't release the full guidelines, then how are borrowers supposed to know if what happened to them will qualify for relief or not? That seems to me like really basic information that you should have released in November before you started sending letters to homeowners. I'm deeply concerned about the inadequate reference in your testimony to merely "supplemental guidance" and that the OCC just isn't getting the message that full public transparency is absolutely essential to having any public confidence in these reviews, especially since the OCC has already tainted the reviews with its decision to allow banks to choose their own judges.

A.19. The OCC and the Federal Reserve expect that the final remediation framework, which will provide types and amounts of remediation expected under various scenarios, will be complete in March. We plan to make it publicly available at that time.

Q.20. How will the OCC conduct oversight of consultant activities? What actions will it take if it finds their performance lacking or if it finds that they are doing what's in the best interests of the big banks instead of what's in the public interest? Will there be a process where the first line of reviewers at the consultants can directly contact the OCC about these problems without going through their supervisors at the consultants or any other layers of bureaucracy?

A.20. OCC oversight of all independent consultants involved in the foreclosure review process is conducted on a two-tiered level OCC examiners regularly review and discuss consultants' work, often onsite at individual institutions, and discuss activities and findings with OCC senior managers on an ongoing basis. At an agency-wide level, OCC senior managers meet separately each week with the

independent consultants, the Federal Reserve staff, and the servicer consortium to discuss progress, issues, and challenges. The independent consultants have been provided multiple direct points of contact with OCC supervisors in our Washington, DC, headquarters as well as onsite OCC supervisors at each institution and are encouraged to raise any issues of concern. OCC senior managers also meet periodically with community and housing advocates and other Federal agencies to discuss the Independent Foreclosure Review process.

Full and timely compliance with the Consent Orders will help ensure that both the industry and the public interest are well served going forward. If the OCC determines timely compliance with Consent Order requirements is hindered due to shortcomings in individual consulting firm performance, several steps can be taken. They range from providing the applicable firm a notice of opportunity to improve, to requiring the servicer to terminate the contract and replace the firm.

Q.21. Will the OCC consider establishing an ombudsman to handle borrower complaints about the independent foreclosure review process? What is the process for borrowers who file complaints about the handling of their cases by the consultants?

A.21. The Independent Foreclosure Review is a process established pursuant to the Consent Orders. It is not subject to an appellate type review of individual decisions by the OCC's Ombudsman; however, the OCC will take into consideration complaints received about how the process is being conducted in its oversight of the independent consultants and servicers pursuant to the Consent Orders.

Q.22. How will the OCC conduct oversight of servicers who are not providing the consultants with complete and accurate information in a timely manner?

A.22. OCC examiners regularly review and discuss the independent consultants' work, often onsite at individual institutions, and discuss activities and findings with OCC senior managers on an ongoing basis. OCC senior managers meet each week with the consultants, and have provided the consultants multiple direct points of contact with OCC supervisors and onsite examiners to raise any issues of concern. The OCC closely monitors the status of file reviews performed by the independent consultants from intake to final conclusion. The OCC will immediately address any identified impediments to the Independent Foreclosure Review process. Should any servicer fail to provide the consultant with complete and accurate information in a timely manner, the OCC will address the issue immediately and directly with the servicer.

Q.23. Some of the engagement letters between servicers and their independent consultants invoke attorney-client privilege and attorney work product privilege over the whole process and confidential treatment of the engagement letter itself. In fact, all servicers used their general counsel's office to engage the independent consultants and outside counsel, and some servicers name their general counsel as project lead. Some servicers engaged additional outside legal counsel for the review directly rather than through the primary

consultant. So, given all of this information, does an attorney-client privilege exist between any of the servicers subject to the consent orders, or any of their employees, and the independent consultants or outside counsel retained by them? How does such attorney-client privilege interact or interfere with the responsibilities that consultants have to the OCC? Will this attorney-client privilege at all limit what information will be made public?

A.23. By statute, the OCC has complete and unfettered access to all of the books and records of the servicers, including documents created by the independent consultants in connection with the foreclosure review, regardless of whether or not they are privileged. Therefore, claims of privilege have no impact on the responsibilities that the consultants have to the OCC. Additionally, the OCC required the servicers to waive attorney-client privilege between them and the law firms that were hired to advise the independent consultants if the servicer engaged the law firm and paid the firm's fees directly. While some servicers engaged the independent counsel via an engagement letter signed by their general counsel and asserting various privileges, this does not create a legal impediment to either the regulators' or the consultants' access to information and documents maintained by the servicers concerning the foreclosure review.

Q.24. In their testimony, the Federal Reserve Board commits to imposing fines on servicers found to have acted improperly. Will the OCC commit to doing the same? When the results come out, what factors will you be considering in deciding whether and how much of a monetary penalty to impose on servicers? Suppose for example that a homeowner got charged $5,000 in illegal fines. It seems to me that asking the bank to give back the $5,000 to the homeowner alone doesn't provide sufficient deterrence and that the bank should be fined multiple times that amount to discourage that illegal behavior in the future. Do you agree with that assessment?

A.24. On February 9, the OCC announced agreements in principal with Bank of America, Citibank, JP Morgan Chase and Wells Fargo to settle civil money penalties for deficient, unsafe and unsound mortgage servicing practices. The servicers agreed not to contest the OCC's ability to impose civil money penalties totaling $394 million, and the OCC agreed to hold the $394 million in penalties in abeyance, provided that the banks take actions and/or make payments under the National Mortgage Settlement with a value that meets or exceeds that amount. The OCC's civil money penalty enforcement action is similar in approach to the civil money penalty action taken by the Federal Reserve.

Q.25. What information will the OCC report to the public on the results of reviews and the compensation provided to borrowers, including information on a per servicer, per consultant basis? It is not acceptable to me from a public accountability and transparency standpoint to have aggregate results released without accountability on a bank-by-bank basis. I and many other Members of the Senate want to know for example, how many people in New Jersey were harmed by the foreclosure practices of a particular servicer and how much compensation people received for that wrongdoing.

Will this report on outcomes include information on race and national origin? Income level? Home location? Other demographic factors?

A.25. In July 2011 testimony, the OCC committed to producing an interim report, which it published on November 22, 2011, and a final report of the results at the conclusion of the Independent Foreclosure Review process and other efforts to correct deficiencies identified in the Consent Orders. To provide additional information and transparency around the Independent Foreclosure Review process, the OCC plans to issue additional periodic, public summaries of the developments in implementation of the Consent Orders and the Independent Foreclosure Review. The OCC has not yet determined the content and format of that final report.

Q.26. How exactly did the OCC determine that it would not be a conflict of interest for a consultant to review the work of a servicer when that consultant is being paid or has been paid to do work for that same servicer?

A.26. The engagement of independent consultants subject to the OCC's Consent Orders followed the same process the Federal banking agencies generally utilize with respect to implementation of requirements to hire independent third parties to conduct reviews under § 1818 enforcement orders. Under this process, the financial institution is required to propose engagement of an outside independent party, which is subject to agency non-objection, and the institution is required to pay directly for the third-party services. The banking agency oversees the engagement and examines the results. Under this process, consultants are motivated to perform their services independently, competently, and thoroughly; because, if they do not, they risk having their independence called into question, their resulting work-product rejected, and they risk future approval by the regulators to serve as an independent outside third party with respect to other projects.

Q.27. Will the OCC and consultants institute a permanent mechanism for meeting regularly with a broad cross-section of homeowners and counselors for their input on the process before major decisions are announced? For example, many have raised concerns that the letters sent out to borrowers have no official logo on them and many borrowers will think they are a scam, a mistake which could have been caught if homeowner advocates had been consulted before that form was finalized rather than being written by the banks themselves with no input from the other side.

A.27. The OCC, the Federal Reserve, and the independent consultants have already begun a series of meetings and consultations with community and housing advocates around the Independent Foreclosure Review. Representatives from the National Consumer Law Center, National Fair Housing Alliance, Center for Responsible Lending, National Council of La Raza, Consumer Action, and several other organizations, met with independent consultants, the OCC, and the Federal Reserve on January 5th. The advocates presented their experiences with loan modification and foreclosure cases and explained their specific concerns with the implementation of the Review. The OCC has held two follow-up meetings with these and other advocates to gain feedback on outreach initiatives

and issues presented by the Independent Foreclosure Review process. These meetings will continue to be held every few weeks.

Q.28. Will the mandatory review of all files in certain categories include the category of cases where borrowers previously filed complaints with the servicers about foreclosure actions that were pending in 2009 and 2010? The Fed indicated in their testimony that they are requiring review of all such files.

A.28. The independent consultants will review 100 percent of all foreclosure-related complaints previously submitted by in-scope borrowers that are forwarded by regulators, Government agencies and other officials. Joint guidance provided by the OCC and the Federal Reserve also calls for appropriate samples of other borrower claims and complaints previously submitted to the institution, and the OCC requires that the independent consultants review all complaints submitted by in-scope borrowers from January 1, 2011 through commencement of the borrower outreach process on November 1, 2011.

Q.29. What was the OCC's role in designing, consulting on, or approving the servicers' national print media outreach plan? If homeowners, counselors, advocates or Members of Congress request that changes be made to the national outreach campaign, to whom should they send these requests (ex: the OCC, servicers, their consultants, the Financial Services Roundtable)?

A.29. The development and implementation of the national print media campaign was an iterative process between the servicers and regulators, but subject to final review and approval by the OCC and the Federal Reserve. Feedback and suggestions gained from ongoing meetings and communication with community and housing advocates, including edits to the advertising copy and use of recommended media outlets, was also incorporated into this process. The OCC will continue to monitor the media campaign to determine what media outreach would be beneficial. Any recommendations and suggested changes to the national outreach campaign should be made directly to the Federal regulators.

Q.30. Please describe the exact process by which the claim forms mailed to eligible borrowers were designed. Did the OCC request that any changes be made after reviewing drafts of the form from the servicers? If so, what changes were requested?

A.30. Development of the claims forms was an iterative process between the OCC and the Federal Reserve, independent consultants and servicers following a series of discussions centered on the objectives of the outreach process and the regulators' financial injury guidance. The approach centered on providing a class action style notice to borrowers of their opportunity to submit a claim for an independent review of their foreclosure case. The OCC and the Federal Reserve reviewed and accepted the final claims forms after several edited iterations were drafted and submitted by the servicers and the independent consultants. Required edits by the Federal regulators included revisions to the cover letter, expansion of the examples of situations that could result in financial injury, simplification of questions, for example to ensure proper capture of

active duty servicemember information, and incorporation of Spanish language disclosures.

Q.31. Did the OCC do any usability testing of the claim forms, either with focus groups of borrowers or with form usability experts?

A.31. The OCC did not conduct usability testing beyond internal review among parties with varied expertise and experience, interagency discussion with the Federal Reserve, and dialogue with the servicers and independent consultants.

Q.32. Has the OCC either mandated or encouraged servicers to provide funding to housing counselors, who are expected to assist borrowers in completing the claim forms?

A.32. The OCC is encouraging servicers to provide resources to housing counselors to help make borrowers aware of the opportunity to take advantage of the Independent Foreclosure Review and, where needed, to assist those borrowers during the process. Bank of America has already funded an initiative to engage recognized HUD-approved counseling intermediaries to support enhanced outreach to customers who may be eligible for the Independent Foreclosure Review and to provide help in completing the application. The initiative supports 11 HUD-approved intermediary agencies (who are also National Foreclosure Mitigation Counseling fund recipients) and their nonprofit affiliates and is designed to support grass roots visibility to reach as many eligible customers as possible including low- and moderate-income, multicultural and those who may be experiencing language barriers. The outreach will include: mailings and outbound calling directed at customers believed to be eligible for the Independent Foreclosure Review; traditional grass roots outreach events to provide information to individuals and families; and other activities designed to communicate information to the community, such as newsletters, Web sites, PSAs, and purchased ads. These organizations will also manage two toll-free numbers (one aimed at Spanish speaking borrowers) and will assist borrowers in requesting and completing the Request for Review form, including assembling supplemental information and documents as necessary.

Q.33. As I understand it, the OCC could have directly retained the independent consultants, and directed them to review the actions of servicers subject to the consent orders. The OCC could have then recouped costs related to these reviews via an assessment on the servicers subject to the consent orders. Please describe, in detail, why the OCC did not adopt this approach. If Federal procurement rules were an issue, please describe specifically which rules would have prevented the OCC from swiftly engaging consultants.

A.33. The engagement of independent consultants subject to the OCC's Consent Orders followed the same process the Federal banking agencies generally utilize with respect to implementation of requirements to hire independent third parties to conduct reviews under §1818 enforcement orders. Under this process, the financial institution is required to propose engagement of an outside independent party, which is subject to agency non-objection, and the institution is required to pay directly for the third-party services. The banking agency oversees the engagement and examines the results.

Under this process, consultants are motivated to perform their services independently, competently, and thoroughly, because, if they do not, they risk having their independence called into question, their resulting work-product rejected, and they risk future approval by the regulators to serve as an independent outside third party with respect to other projects.

The OCC considered the option of directly contracting with independent consultants and determined that it would be more appropriate and timely to have the servicers contract directly with the consultants pursuant to the process described above. For example, Federal Government procurement rules require that the OCC conduct full and open competitions for services including the services of consultants unless, for example, there is only one source that can provide the services or there are urgent and compelling circumstances. Even if circumstances are considered urgent and so compelling, the maximum amount of limited competition is required. Given that the services of up to 12 independent consultants were needed, competition would have to include more than 12 offerors.

The procurement process requires that the OCC develop a request for proposals, advertise its requirement, evaluate proposals, negotiate with offerors and make awards. This process can be time consuming and, in the case of the foreclosure reviews, could have taken as long as 6 to 9 months. Because of the number of institutions involved, multiple negotiations with offerors would have been necessary. Additionally, as with any procurement, an interested party may protest at the solicitation, offer or award phase to the U.S. General Accountability Office. This adds risk and time to the procurement process. Because the full scope of the work for the consultants could not be defined up front, it would have been difficult for offerors to price their services and for the OCC to place a dollar value on the contracts. Also, the OCC determined that flexibility in scoping requirements and in making changes based on supervisory needs was important and that such factors do not easily translate to Federal procurement contract types. While there are some contract types that allow more flexibility than others, the OCC would have been in a position of continuously modifying its contracts to ensure the scope of work was correct. The contract risk associated with change in scope was, in our opinion, more appropriately placed on the entities complying with the consent orders rather than the OCC.

Q.34. What procedures are being established for both the foreclosure reviews and the remediation process to ensure uniformity so that borrowers get the same treatment no matter which servicers or consultant they have?

A.34. The OCC and the Federal Reserve have collaborated to provide guidance to the independent consultants with respect to the foreclosure reviews, outreach/request for review process, financial injury, prioritization of file reviews, and remediation to ensure borrowers are treated in a consistent manner. The regulators and independent consultants are in regular, ongoing communication to share information and to ensure standards are being applied in a consistent manner. We have directed the independent consultants

to include quality control processes within their work flow to monitor the quality and consistency of file reviews and address identified issues. These quality control processes carry through to the determination of financial injury as well as remediation. OCC onsite examiners will review processes at each servicer, and will also selectively test file work of the independent consultants to help ensure both quality and consistency.

Q.35. Is it true that the results of the reviews will be shared with banks for comment prior to release, but not with homeowners, who will have no opportunity to comment prior to release? I would urge you to give homeowners equal opportunity to comment prior to release. It is bad enough that there are deep concerns about the true independence of the reviewers without even further biasing the process by allowing only one side to comment on and influence the outcomes.

A.35. Independent consultants may share information with the servicers for the purpose of correcting factual inaccuracies or to obtain documentation in situations where incomplete or missing documentation may be needed to reach an accurate conclusion. The servicers are not permitted to influence conclusions reached by the independent consultants with respect to servicer errors, misrepresentations or deficiencies, or any recommendations with respect to financial injury compensation or other remediation.

Q.36. What steps will the consultants take to ensure that a foreclosure does not happen while a review is underway? How will the consultants know when a foreclosure sale is imminent such that they should halt the foreclosure and/or provide a faster review?

A.36. The OCC has issued guidance to the independent consultants and servicers to try to prevent any borrower who is receiving an independent foreclosure review from losing their home without their file first receiving an independent review or a pre-foreclosure sale review. All borrower requests and other files selected for an independent foreclosure review will be monitored on at least a weekly basis to determine if a foreclosure sale is scheduled. The independent consultants will prioritize their review of these requests and files according to the scheduled foreclosure sales date. Additionally, servicers, subject to independent consultant testing and validation, will be required to promptly review all borrower requests for an independent foreclosure review and borrower submitted documentation, to determine if a scheduled foreclosure sale should be postponed, suspended or canceled. Servicers, after being notified of a borrower request for review, also must promptly determine whether the borrower is currently in an approved active loss mitigation program or is being actively considered for a HAMP or other modification or loss mitigation program and whether further foreclosure proceedings and/or scheduled foreclosure sale be postponed, suspended or canceled as required by the applicable program standards. We encourage borrowers who believe they have a basis to submit a request for review and are facing foreclosure to submit their requests as soon as possible and to also continue with their foreclosure prevention efforts directly with the servicer, since submission of the request for review form just prior to foreclosure

sale may not allow for sufficient time for the above checks to be completed.

Q.37. I was very disturbed by the testimony indicating that if the consultants wish to contact or speak directly with borrowers, they are expected to contact the servicer first. How is it even remotely appropriate for the consultants, who are supposed to maintain independence at all times, to have to notify or get permission from the banks to contact borrowers? Will the OCC change its directives so that consultants do not have to either notify or get the permission of the banks to directly contact borrowers? For consultants to evaluate homeowner claims fairly requires open and direct communication between the consultants and homeowners and their advocates and should never be deterred by the servicer as an intermediary between them.

A.37. Independent consultants do not have to obtain the permission of servicers to contact borrowers, and servicers do not dictate what additional information may or may not be needed by the independent consultants from the borrower. Independent consultants may exercise their judgment, consistent with the terms of their engagement, in deciding whether to request additional information from a borrower. It has never been the OCC's position to prohibit contact between the independent consultants and borrowers' rights advocates. In fact, the OCC is facilitating such meetings.

Q.38. Is there a protocol requiring the consultants to reach out to homeowner advocates when there is evidence in the file that they were involved? Is there a protocol about how the reviewers will respond to inquiries from parties authorized on behalf of borrowers? If there are protocols, please describe them. If there are not protocols, I respectfully ask that you establish them.

A.38. The borrower is free to enlist the assistance of housing counselors or other homeowner advocates to assist them in preparing the complaint form. This can be done in several ways. A borrower may request the Request for Review form from the Independent Foreclosure Review call center, or use a Request form already received in the mail, and sign and return the form. If the borrower seeks to have a homeowner advocate request a form or otherwise communicate on his or her behalf, he or she would need to submit a signed written authorization to allow the homeowner advocate to communicate with representatives of the Independent Foreclosure Review. If the homeowner advocate wishes to sign the form on the borrower's behalf, a legal power of attorney is required.

We are pleased to report that on March 2, 2012, the *IndependentForeclosureReview.com* Web site was enhanced to allow for the intake of Request for Review forms online. This new capacity for online submission of claim forms through the Web site will facilitate and provide additional access for borrowers and for borrower representatives to assist borrowers in filing a request for review.

Q.39. Can you commit to contacting homeowners or their advocates if pertinent information is missing? It is tremendously important that the reviews not be conducted on "submitted documents" alone, since we know that servicers have lost paperwork and servicer files

may not be complete, and that homeowners who don't have a counselor or attorney to guide them through the process don't really know what proof they need to send in.

A.39. For most cases, records required for review will be found in the servicer files, attorney case files, and/or will be supplied by the borrower in connection with their complaint submission. However, the independent consultant may exercise their judgment, consistent with the terms of their engagement, in deciding whether additional information is needed from the borrower.

Q.40. What experience requirements are mandated by the OCC for foreclosure file reviewers? How long is the mandatory training program for them? This strikes me as something that can't be learned in a 2- or 3-week training program, but would take years of experience. It seems to me that you really need lawyers reviewing these files on such complicated legal questions, but given some of the questionable job ads that have appeared, I question the qualifications of some of those being hired to do these reviews and make decisions that will have profound impacts on the lives of struggling families.

A.40. In-depth and elaborate tools have been prepared by the independent consultants and their outside counsel to assist file reviewers, and reviewers are assigned based on experience level of the task required (*i.e.,* basic file review may entail review by a contractor trained to respond to a specific inquiry; quality assurance reviewers will have a higher level of relevant experience). Training is also provided by the independent consultants to file reviewers. Each of the independent consultants also has engaged independent counsel to help them address legal issues that require the assistance of counsel in order to properly review a borrower case file. OCC examiners also serve in an oversight role and will review samples of individual files as another quality assurance measure to ensure that the file reviews are being conducted appropriately.

Q.41. If consultants are only reviewing borrowers for the items they check on the letter, then why aren't borrowers informed of that important fact in the letter?

A.41. The letter and Request for Review form encourage borrowers to provide all information the borrower feels relevant and provides clear opportunity for the borrower to address any other issue in an open-ended question. Providing as much information as possible in describing borrowers' concerns helps ensure an accurate and effective review by the independent consultants.

Q.42. What information obtained from borrowers will the consultants or Rust share with the servicers? This has Fair Debt Collection Practice Act implications, and there should be clear and public guidelines on this. Homeowners are more likely to trust the process if their personal information is not shared with the servicer (counselors have already had homeowners contact them who said that the potential use of information by the servicer is one reason why they don't want to return the form).

A.42. Information submitted on the borrower Request for Review form is made available to the respective servicers in order to facilitate the collection of necessary documents for review by the inde-

pendent consultants. However, we have directed servicers to limit the use of contact or personal information provided in connection with the Independent Foreclosure Review only for purposes relating to the Independent Foreclosure Review process. We believe this mandate will address any borrower concerns regarding a servicers' use of updated contact information for debt collection efforts against a borrower who provides such information in connection with his or her Request for Review submission. Our initial research into the matter determined that use of Request for Review form information to collect on borrower debts was never contemplated by the servicers; nonetheless, we have issued a clear mandate to provide eligible borrowers with these additional assurances. Information concerning this mandated privacy policy now appears on the *www.IndependentForeclosureReview.com* Web site.

Q.43. Testimony indicated that only 5 percent of mailings have been returned undeliverable, and that seems like a surprising statistic considering how many people who are foreclosed on move multiple times afterward. What explains that low rate of returns? Is it possible the letters are still sitting in unused mailboxes without being returned as undeliverable? Is there any in-person outreach being done to reach borrowers?

A.43. As of March 4 and after completion of all 4.3 million initial mailings, 5.6 percent have been returned undeliverable with no additional alternate addresses available. Second and third mailings using an address trace process to reach additional borrowers are currently nearing completion. The low undeliverable rate is a result of effective efforts to identify current and accurate addresses of potentially eligible borrowers. To help reach those people where direct mailing is unsuccessful, the OCC and the Federal Reserve have also required nationwide public awareness advertising. In addition, the OCC published public service articles and radio spots for use in small newspapers and radio stations throughout the country and continues to conduct media interviews on the subject. The OCC and the Federal Reserve are also facilitating educational and awareness outreach meetings with housing advocacy groups, including two nationwide Webinars, to increase awareness of this effort.

The OCC also is encouraging servicers to provide resources to housing counselors to help make borrowers aware of the opportunity to take advantage of the Independent Foreclosure Review. As previously described, one major servicer has already funded an initiative to engage 11 HUD-approved counseling intermediaries to support enhanced outreach to reach as many eligible customers as possible including low- and moderate-income, multicultural, and those who may be experiencing language barriers.

Q.44. What has the borrower response rate been so far among the borrowers who have been contacted? What percentage have already returned their completed forms?

A.44. All of the scheduled 4.3 million independent foreclosure review forms have been mailed, and second and third mailings to borrowers where the initial mailing was returned undeliverable are nearing completion. Through March 4, 113,894 Requests for Review have been received. On February 15, the OCC and the Federal Reserve jointly announced that the deadline for borrowers to submit

a request for review to the Independent Foreclosure Review process had been extended from April 30, 2012 to July 31, 2012. The 3-month extension will provide more time to increase awareness of how eligible people may request a review and to encourage the broadest participation possible. The national print media campaign will also be extended to further increase and expand public awareness of the Independent Foreclosure Review process.

Q.45. Shouldn't people be able to go to a Web site to get the form they need rather than relying on mailings alone?

A.45. We are pleased to report that on March 2, 2012, the *IndependentForeclosureReview.com* Web site was enhanced to allow for the intake of Request for Review forms online. Online submission of claim forms through the Web site further facilitates and provides additional access for homeowners to Request for Review forms online.

Q.46. Can the Web site be immediately redesigned to look more official, but also easier for borrowers to understand? It is currently so primitively done that it looks like a scam.

A.46. Changes to the text of the site have been made to reference the OCC and the Federal Reserve in order to provide additional credibility and assurance to site visitors that *www.IndependentForeclosureReview.com* is a legitimate site and program.

Q.47. How will the borrowers who lost their homes to foreclosure or who have relocated be contacted? Can you commit to consulting with a wide variety of homeowner advocates including housing counselors and attorneys to gather any homeowner contact information from them?

A.47. Outreach actions to contact and promote an informed awareness among in-scope borrowers have included direct mail supported by a mass media (print) campaign and public service announcements promoted by the OCC. The direct mail campaign started with the borrower's current active address or last known active address. All addresses on file were run through a national change of address database to identify a more current address. Several servicers also processed borrower addresses through a third-party consumer database using information from sources such as credit bureaus, public records/registrations, utilities, phone number databases *etc.,* to determine the most likely current addresses. Returned mail for servicers who did not "pre-trace" borrower addresses was subject to the above tracing process. Any returned mail from the next contact attempt was processed using human judgmental decisioning to determine most likely current addresses. We attribute the relatively low numbers of returned mail to the level of efforts made to pre-trace and post-trace borrower addresses. This address tracing process is further supplemented by the print media advertising campaign and OCC-promoted public service announcements to help reach borrowers who may not have received the direct mailing. The OCC is regularly meeting with various housing counselors and advocates to explore additional methods to reach relocated borrowers and increase customer awareness of the Independent Foreclosure Review program.

As described in previous answers, the OCC is encouraging servicers to provide resources to housing counselors to help make borrowers aware of the opportunity to take advantage of the Independent Foreclosure Review and, where needed, to assist those borrowers during the process.

Q.48. What provisions are being made for outreach, materials (including required forms), and assistance to be provided in languages other than English? I've heard concerns that the way the outreach is being conducted may violate the Fair Housing Act. How will you ensure that all outreach materials comply with Limited English Proficiency Executive Order 13166?

A.48. There are multiple efforts currently underway to make outreach and information about the Independent Foreclosure Review available in languages other than English. The RUST toll-free call center has translation services available in over 240 languages, and the operators can also translate documents for borrowers over the phone. Spanish language translations of the Frequently Asked Questions and a Spanish language guide on how to complete the form are now available on the *IndependentForeclosureReview.com* Web site. The OCC will be monitoring the volume of calls coming into the RUST call center from borrowers who request translation services and will use this data to determine if other similar translations are necessary to serve other non-English speaking populations.

Q.49. The Spanish messages on the mailed claim forms and proposed print ads give unclear directions. Do call centers have representatives who are capable of taking calls in Spanish? Will Spanish-speaking borrowers be required to obtain their own independent interpreters in order to navigate the process?

A.49. The call center does have Spanish translators available at all times. Spanish-speaking borrowers and any other non-English speaking borrowers will not be required to obtain their own translators; statements to that effect contained in the draft of the advertisement and on the Web site have been removed.

Q.50. Will Rust provide a 1–800 number for translation of forms and other guidelines?

A.50. Yes. Borrowers can request a free translation over the phone of forms and other letters they receive by calling the main RUST 1–800 number available to all borrowers.

Q.51. Will outreach and print ads be done through Spanish-language media in select markets?

A.51. The OCC worked with servicers to expand their media plan to include Spanish-language placements in key markets. In addition, the OCC public service advertisements were produced in Spanish and distributed to hundreds of small Spanish language publications and radio stations throughout the country for their use.

RESPONSE TO WRITTEN QUESTION OF SENATOR REED FROM JULIE L. WILLIAMS

Q.1. As part the foreclosure review process, what is the extent of the Department of Justice's (DOJ) involvement with respect to in scope borrowers who are covered by the Servicemembers Civil Relief Act (SCRA)? Will the OCC provide the DOJ with every opportunity and the ability to determine (a) whether a servicer has engaged in a pattern or practice of violating the SCRA and (b) whether a servicer has engaged in a violation of the SCRA that raises an issue of significant public importance? If not, please explain why not.

A.1. The OCC has been working closely with the Department of Justice (DOJ) to ensure that borrowers covered under both of our respective enforcement actions are treated similarly, and we are committed to sharing the results of the SCRA foreclosure reviews with the DOJ for all servicers under OCC orders or orders under our jurisdiction. Not only has the DOJ been provided with every opportunity and the ability to determine whether a servicer has engaged in a pattern or practice of violating the SCRA or engaging in an SCRA violation of significant public importance, but OCC staff at all levels have been in regular, sometimes daily, contact with their DOJ counterparts to ensure that we are taking consistent approaches to common issues. We have found the DOJ to be extremely helpful to us, especially with regard to interpretive issues, discussions of remediation of violations, and in resolving issues with the Defense Manpower Data Center database. We greatly appreciate the assistance they are providing us and value highly our working relationship with them.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR MERKLEY FROM JULIE L. WILLIAMS

Q.1. Given the difficulties of reaching all eligible homeowners, will the OCC consider extending the deadline for applications beyond April of 2012?

A.1. On February 15, 2012, the OCC and the Federal Reserve announced an extension of the deadline for individuals to request a review under the Independent Foreclosure Review. The new deadline is July 31, 2012, and provides an additional 3 months for borrowers to request a review. The deadline extension provides more time to increase awareness of how eligible borrowers may request a review through this process, and to encourage the broadest participation possible.

Q.2. Is it correct that homeowners will be evaluated only for those "boxes" they check even if they were to mistakenly check the wrong box?

A.2. The purpose of the background questions is to assist borrowers in communicating how they believe they were financially harmed. The independent consultants will focus their review on these areas to ensure that the borrowers' specific concerns are evaluated. To the extent borrower descriptions are incomplete, inadequate or vague, independent consultants will treat such claims as a "generalized" complaint subject to a full scope review. In addition, we

have instructed independent consultants that all servicer errors identified during the file review that resulted in financial injury must be remediated as appropriate.

Q.3. Homeowners applying for a loan modification can be financially harmed simply due to servicer delays in processing their application. Will such delays be considered to constitute "financial harm?"

A.3. The OCC and the Federal Reserve are in the process of finalizing the financial remediation framework. As part of that, we have considered how to incorporate into the framework financial injury resulting from servicer delays in processing borrower applications for loan modifications in cases where there was a requirement to process a completed application within a specified timeframe (*i.e.,* under HAMP) that was not met. We expect to be able to release this remediation framework in March.

Q.4. One of the consultants who testified on December 13 suggested that cases where a homeowner lost his or her home through a process that included robo-signing of affidavits would not necessarily have suffered any financial harm. Will the remediation construct being developed by the OCC recognize financial injury when a homeowner is thrown out of his or her home due to the illegal robo-signing of affidavits?

A.4. The remediation framework being developed by the OCC and the Federal Reserve is designed to remediate direct financial injury suffered as a result of errors, omissions or misrepresentations by the servicers. If the independent consultant determines that there was direct financial injury suffered as a result of robo-signing of affidavits, then, pursuant to plans that must be approved by the OCC, the servicer will be required to remediate such harm. However, the act of robo-signing alone does not in and of itself constitute direct financial injury that is compensable under the Independent Foreclosure Review.

Q.5. The remediation construct that will direct the consultants will play a pivotal role in determining the amount of compensation homeowners will receive. How soon will you be able to share a copy of that document with our office?

A.5. The OCC expects the remediation framework will be completed in March. We plan to make it publicly available at that time.

Q.6. Will homeowners be provided access to the remediation framework?

A.6. See answer above.

Q.7. Would the OCC allow a homeowner to lose their home during the time they are waiting for a review and determination of their case?

A.7. The OCC has issued guidance to the independent consultants and servicers to try to prevent any borrower who is receiving an independent foreclosure review from losing their home without their file first receiving an independent review or a pre-foreclosure sale review. All borrower requests and other files selected for an independent foreclosure review will be monitored on at least a

weekly basis to determine if a foreclosure sale is scheduled. The independent consultants will prioritize their review of these requests and files according to the scheduled foreclosure sales date. Additionally, servicers, subject to independent consultant testing and validation, will be required to promptly review all borrower requests for an independent foreclosure review and borrower submitted documentation, to determine if a scheduled foreclosure sale should be postponed, suspended or canceled. Servicers, after being notified of a borrower request for review, also must promptly determine whether the borrower is currently in an approved active loss mitigation program or is being actively considered for a HAMP or other modification or loss mitigation program and whether further foreclosure proceedings and/or scheduled foreclosure sales should be postponed, suspended or canceled as required by the applicable program standards. We encourage borrowers who believe they have a basis to submit a request for review and are facing foreclosure to submit their requests as soon as possible and to also continue with their foreclosure prevention efforts directly with the servicer, since submission of the request for review form just prior to foreclosure sale may not allow for sufficient time for the above checks to be completed.

Q.8. What provisions will OCC make for direct interactions between the homeowner and the reviewer of their application?

A.8. The independent consultants will review all information submitted by the borrower as well as information provided by the servicer as included in the borrower's file. Independent consultants may exercise their judgment, consistent with the terms of their engagement, in deciding whether additional information is needed from a borrower to conduct their review.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR CORKER FROM JULIE L. WILLIAMS

Q.1. Are we permanently scaring off investors by telling them that when they buy an American mortgage security they have to deal with not only Federal regulations but 50 State AGs? I talk to countless investors who are telling me they are "on strike," so to speak, and they will stay on strike until they have clarity over the rules for foreclosures and loss mitigation. Basically we are scaring away investors with these lawsuits, which seems to me to be a problem given that all of the evidence thus far suggests that these were homeowners who were not paying their mortgages. Would anyone care to address this risk? Do any of you share these concerns?

A.1. *See* response to question 3 below.

Q.2. Do we need a uniform PSA to govern loss mitigation? I have a bill that directs the FHFA to work with industry participants to craft a PSA that would give investors and homeowners clarity on the rules of the road for loan modifications and loss mitigation. Do you all think this is a worthwhile idea?

A.2. *See* response to question 3 below.

Q.3. Do we need to codify into law, and regulate with clarity, proper registration of mortgages? Our bill calls for a new platform to serve as the source of electronic registration for mortgage ownership, which would be regulated by FHFA and overseen by the Congress. Would this be a helpful step in ensuring we have 21st century infrastructure to go along with a 21st century capital markets regime?

A.3. Each of the foregoing questions raise very important issues about the standards and infrastructure supporting housing finance in the United States. A modern, efficient system that supports home ownership opportunities, responsible lender behavior, and healthy mortgage markets would include elements of clear, predictable and consistent national standards and utilization of 21st century technology to enable efficient operation of the mortgage finance system. We welcome the opportunity to be part of this dialogue.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR WARNER FROM JULIE L. WILLIAMS

Q.1. Even with some signs of increased demand, it seems like the mortgage market in 2012 could be a lot like 2011, and housing prices may even decline according to some projections. Seventeen percent of FHA's portfolio is delinquent and over 10 million homes nationwide are underwater. S&P thinks it will take almost a year to work through the excess inventory of houses. Considering the state of the housing market, does the OCC believe that a refinance program for non-GSE owned homes could be beneficial to homeowners, lenders, and housing market recovery? Should such a refinance program, or the current HARP program be applicable to homeowners with over 20 percent equity?

A.1. The OCC has not taken a position of any on the various refinancing ideas that have been suggested for non-GSE backed mortgages.

Q.2. My staff is still receiving consistent complaints about the quality of customer service by servicers, which directly affects the rate of foreclosures. The OCC has completed an Interagency Review of Foreclosure Policies and Practices and has participated in efforts toward implementing national servicing standards. How do you measure the progress made in the last few years toward effective servicing? Can you give us a status report on the implementation of national servicing standards? Can regulators affect the quality and capability level of servicing professionals that are hired? How should I characterize servicing oversight and improvements to my constituents?

A.2. This is an area where mortgage servicers need to continue to improve the quality of customer service. The OCC and the Federal Reserve Consent Orders require a number of crucial steps. The National Mortgage Settlement imposes detailed requirements on the five largest servicers, and the OCC and other Federal agencies have undertaken to develop more comprehensive uniform mortgage servicing standards that will apply not just to federally regulated banks and thrifts, but to all mortgage servicers. This latter effort

is in early stages and is strongly supported by the OCC. There is much work still to be done but important new standards are already being applied to the largest federally regulated servicers as a result of the OCC and the Federal Reserve Consent Orders.

Q.3. Based on reports from my State staff, there are three specific issues I want to address in the context of progress toward improved servicing standards. First, difficulty obtaining permanent modifications: Folks will complete their 3-month trial modification, and then be rejected for a permanent modification. And according to housing counselors, all of these loss mitigation decisions take too long. Can you characterize what percent of homeowners nationally have typically qualified for HAMP or proprietary modifications and then are rejected for permanent modifications? Does the OCC see any feasible changes in the eligibility for permanent modifications that would maintain success rates in permanent modifications but allow greater eligibility?

A.3. The OCC does not have data on the number of borrowers qualified for a HAMP or proprietary modification program that ultimately receive or are rejected for permanent modifications. The Making Home Affordable (MHA) program administered by the Treasury Department could have applicable information on HAMP modifications. The OCC believes that the eligibility criteria currently used for HAMP reasonably balances borrower qualification requirements with investor expectations for a positive, comparative net present value return and an acceptable post-modification success rate. Proprietary programs currently in effect to supplement HAMP provide greater flexibility for borrower eligibility, but at the expense of lesser post-modification success.

Q.4. Second, short sales: If my constituents need to leave their home, a short sale may be their best option. I hear a lot of reports that homeowners are having trouble getting short sales approved, they go through multiple rounds of negotiations for an underwater home and are lucky if they can get approval. Can you discuss the OCC's regulatory concerns with short sales, and how we can make short sales a more viable option for homeowners? Shouldn't the mortgage owners want a new borrower in the home who can better afford the payments? Are there options for credit reporting following short sales that lenders can use to minimize credit damage to homeowners?

A.4. The OCC endorses short sales as a viable loss mitigation alternative for many troubled borrowers, and OCC mortgage metrics data obtained from nine of the national banks under the Consent Orders shows that short sales have steadily increased over the past 2 years, from 30,766 transactions in the third quarter of 2010 to 57,479 transactions in third quarter 2011. Unfortunately, while short sales continue to increase, accomplishing a successful short sale at times can be a very complicated process, especially when the servicer does not service or own both the senior lien mortgage and the junior lien loan(s), or when there is a third-party investor or another institution that provides private mortgage insurance for the loan(s). To affect a successful short sale, there generally must be a purchase offer that results in a positive net present value return (vs. a foreclosure) to the third-party loan investor or mortgage

insurance provider. The offer must come from a qualified purchaser with either cash or available financing to accomplish the purchase. In addition, investors may not allow servicers the significant time often necessary to negotiate a short sale when those timeframes conflict with established foreclosure processing timeframes. And, junior lien holders on the property must also be receptive to the transaction and willing to release their liens. Short sales cannot always be accomplished because these criteria cannot be met.

The OCC believes that credit reporting must accurately reflect the facts and circumstances around how a borrower has performed under a credit arrangement. Reliable credit bureau information is the foundation for the vast majority of consumer credit that exists today, allowing lenders to make informed credit decisions and offer credit to the broadest borrower population possible. Credit reporting should be an objective process that allows lenders to make informed decisions based on a borrower's demonstrated creditworthiness. How lenders use the information is part of the underwriting process when considering new or additional credit. Reporting that does not accurately portray the facts and circumstances of a credit arrangement weakens the usefulness of the information and would be a concern.

Q.5. Third, dual-track processes are still happening: Homeowners are still receiving foreclosure notices and auction date notices while they are working toward modifications. Internal communications seems to be a problem within the large lender and servicer organizations. What must be done internally in lender and servicer organizations to end the dual track, and what abilities do the banking regulators have to cause expedited improvement here?

A.5. This is an area actively under review by the OCC. The OCC's Consent Orders require servicers to implement procedures under approved action plans to ensure that no further foreclosure or legal action predicate to a foreclosure occur when the borrower's loan has been approved for a trial or permanent modification, unless the borrower is in default on the terms of the trial or permanent modification. We are currently assessing each servicer's progress in completing required changes in this and other areas. Moreover, it was also contemplated under the orders that servicers will be required to revise action plans to comply with any *higher* standards that might be required by developing national servicing standards, other negotiated settlements or contractual agreements, including those subject to the National Mortgage Settlement, or in some respects, new requirements imposed by the GSEs. The OCC also expects the servicers to comply with other applicable dual-track standards required under the Making Home Affordable program, as well as applicable GSE and investor standards. With respect to the latter two, however, it is important to recognize that contractual requirements and requirements may determine servicer actions and timing in processing foreclosures.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR MENENDEZ FROM ALYS COHEN

Q.1. You voiced several concerns regarding the outreach process, including complexity, inability to access forms, and many others.

What specific suggestions for improvement can you offer the OCC, servicers, and consultants to implement?

A.1. Any marketing changes that are made will only be useful if the reviews themselves are both thorough and fair. With regard to outreach, key changes to be made include: sending a letter to homeowners that is understandable and that properly highlights the scope of harm covered by the reviews; advertising must be done in order to reach affected populations including communities of color; materials and assistance must be done with language access needs met; and the deadline for submission of claims should be extended to allow for improvement to the outreach process. Everything about the outreach process, including letters, should be made public in order to ensure accountability. Finally, homeowners and the public need to know that the review process will be thorough and fair and provide adequate compensation without inappropriate waivers of legal rights; without these assurances, homeowners are unlikely to and should not trust the process. Glossy outreach without substance is merely another name for fraud.

Q.2. The foreclosure review application requests that applicants check boxes for the types of harm (from a very narrow list) which correlate with the harm they have suffered. However, their application will only be reviewed for the types of harm checked. If the homeowner submits the form and checks no boxes, they will be reviewed for all of the types of harm listed, which is still limited. What solutions do you suggestion for this issue?

A.2. Every claim submitted by a homeowner should receive a full review for all types of harm based on the servicer's file, the claim and necessary follow up, including consumer interviews where applicable. Homeowners often are not in a position to know whether they were overcharged or were otherwise denied proper loss mitigation. While it has been suggested that homeowners should be told that reviews are dictated by what the consumer identifies, this disclosure is unlikely to be understandable to most consumers and thus would not be an adequate protection against a faulty review. Moreover, such a disclosure does not change the fact that homeowners will not be able to identify all of the harms they have suffered.

Q.3. You mentioned in your testimony two types of harm not listed in the OCC's list of 22 examples. Are there any other types of harm that should be considered as well that are not covered by the OCC's examples?

A.3. The consent orders and the documents connected with the foreclosure reviews fail to cover all foreseeable economic damage in the definition of financial injury and omit common examples of significant financial harm to consumers. The OCC's narrow definition of financial harm is at conflict with long settled and well-established rules about available damages and undermines homeowners' rights. It will leave many homeowners uncompensated for harm they have suffered at the servicers' hands.

Among the harms that should be considered are the following:

- Servicer delays in processing and approving a modification cost homeowners thousands of dollars in additional interest and fees that is then rolled into the principal balance.
- Being improperly placed into a non-HAMP modification is costly for homeowners. The interest rate may reset sooner, may not be reduced as low, legal rights may be waived, additional costs may be capitalized, the waterfall may extend the term before lowering the interest rate (costing average homeowners tens of thousands of dollars), or the terms may be less advantageous in other ways. Homeowners in proprietary modifications lose the benefit of the HAMP borrower incentive payments and face a higher risk of a subsequent foreclosure.[1] The increased risk of redefault is a quantifiable economic harm, but it does not appear compensable under the OCC metric.
- The cost of credit and insurance are driven by credit scores: a wrongful foreclosure can easily cost a homeowner thousands of dollars annually just on these two fronts.
- Employers and landlords also both rely on credit scores; a wrongful foreclosure can result in lost jobs and difficulty locating alternative housing.
- Homeowners spend time and money trying to unravel wrongful foreclosures: the need to send notarized documents by overnight mail repeatedly to the servicer by itself can result in hundreds of dollars of out-of-pocket expenses. Homeowners should be compensated for all time and out-of-pocket expenses incurred in correcting the servicer's malfeasance.
- Children who suffer dislocation due to foreclosure may lose educational opportunities and experience poor health. Families should be compensated for these economic harms.
- Families are often torn apart by a foreclosure; compensation should be offered for all the psychological and social damage done by a wrongful foreclosure.
- Any waiver demanded by the servicer must be offset by full compensation for all legally cognizable harm and limited to a waiver of claims related to the scope of the waiver. Otherwise, homeowners will be further injured by servicers without redress.

Q.4. You stated in testimony that the servicers' general counsel's offices appeared to have been involved in drafting the engagement letters for the third-party consultants, and expressed concern about whether that was being done to create attorney-client privilege. Can you elaborate on that?

A.4. In many cases, the "project leads" of the foreclosure reviews are the servicers' own general counsel office and in all cases the engagement letters that have been released reveal that the servicer's general counsel's office is the point of contact for the review.[2] The

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[1] *See* Office of the Comptroller of the Currency, *OCC Mortgage Metrics Report: Disclosure of National Bank and Federal Thrift Mortgage Loan Data, Second Quarter 2011,* 40 (June 2009).

[2] *See* Francine McKenna, *OCC Foreclosure Review Disclosures Still Disappoint,* Am. Banker, Dec. 6, 2011, *available at http://www.americanbanker.com/bankthink/OCC-foreclosure-review-disclosures-still-disappoint-waters-1044628-1.html?zkPrintable=true.*

following excerpt from the recent article highlighting these issues elaborates on this:

> One tricky area for the consultants and legal counsel is attorney-client privilege. The engagement letters include boilerplate language that emphasizes the OCC is the primary director of the engagement at each servicer. However, the level of emphasis of this fine point in the final versions varies.
>
> Some of the engagement letters invoke attorney-client privilege and attorney work product privilege over the whole process and confidential treatment of engagement letter itself. It appears all the servicers used their general counsel's office to engage the consultants and outside counsel and some name their general counsel as project lead. Some servicers engaged additional outside legal counsel for the review directly rather than through the primary consultant.[3]

Whether or not this creates problems regarding access for public officials, it certainly appears to be an effort to keep the process and outcomes of these reviews out of the public eye. Moreover, it makes clear that, despite boilerplate language to the contrary, the consultants are working for the servicers. The use of attorney-client privilege by the servicers could prevent homeowners and the public at large from ever knowing the scope or results of the reviews. Servicers could invoke attorney-client privilege to prevent homeowners from presenting to courts evidence of the servicers' wrongdoing, if that evidence was in any way touched on during the foreclosure review. This leaves homeowners in a catch-22: compensation they receive from the foreclosure review process is uncertain and likely coupled with a waiver of all legal claims, but attempts to vindicate their rights outside of the foreclosure review process are likely to be met by stonewalling on the part of the servicer.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR CORKER FROM ALYS COHEN

Q.1. Are we permanently scaring off investors by telling them that when they buy an American mortgage security they have to deal with not only Federal regulations but 50 State AGs? I talk to countless investors who are telling me they are "on strike," so to speak, and they will stay on strike until they have clarity over the rules for foreclosures and loss mitigation. Basically we are scaring away investors with these lawsuits, which seems to me to be a problem given that all of the evidence thus far suggests that these were homeowners who were not paying their mortgages. Would anyone care to address this risk? Do any of you share these concerns?

A.1. Real estate investments have always been subject to State law. In the years leading up to the crash, investigations and enforcement actions by State officials did not deter investment in real-estate secured loans. Instead, investors have relied on representations and warranties by originators and servicers as to compliance with applicable State laws. If investors are scared off now, it is because originators and servicers have failed to make good on those representations and warranties to investors.

Additionally, investors suffer significant losses when homes are foreclosed on. These losses far exceed the losses when loans are

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[3] *Id.*

modified. Unsurprisingly then, many investors have expressed an interest in seeing the same result as sought by the 50 State AGs: greater efficiency in the processing of loan modifications and increased numbers of loan modifications, including principal reductions.

Servicers' failure to meet their legal and fiduciary obligations to investors and homeowners is a leading cause of the current crisis. Servicers must be held accountable in order to restore confidence in our real estate and investment markets. State and Federal enforcement actions are one key mechanism for changing abusive behavior. Establishment of strong, minimum national servicing standards will provide clarity to industry while ensuring fairness and efficiency to homeowners and the market.

Q.2. Do we need a uniform PSA to govern loss mitigation? I have a bill that directs the FHFA to work with industry participants to craft a PSA that would give investors and homeowners clarity on the rules of the road for loan modifications and loss mitigation. Do you all think this is a worthwhile idea?

A.2. Strong minimum standards—with room for parties or states to require more as dictated by their circumstances—are essential to establishing an efficient and fair mortgage servicing market. While such standards could be developed in a uniform PSA, investors, homeowners, and regulators have struggled to hold servicers to the standards in existing PSAs. The accountability mechanisms in PSAs typically allow servicers to evade or delay meaningful compliance. Moreover, the provision of minimal national servicing standards by law or regulation would be less intrusive of the free marketplace, by allowing contracting parties to design their PSAs to suit their individual circumstances. The provision of national servicing standards might result in greater uniformity in some PSA standards, but would be more targeted, less invasive, and more enforceable. While a set of minimum PSA provisions may be advisable for a variety of reasons, the Government has not typically dictated the provisions of private contracts, but provided ground rules for competition.

Q.3. Do we need to codify into law, and regulate with clarity, proper registration of mortgages? Our bill calls for a new platform to serve as the source of electronic registration for mortgage ownership, which would be regulated by FHFA and overseen by the Congress. Would this be a helpful step in ensuring we have 21st century infrastructure to go along with a 21st century capital markets regime?

A.3. The key issue regarding registration of mortgages is whether legal compliance and transparency are satisfied. The current MERS system provides neither and therefore creates huge roadblocks for homeowners defending foreclosures. Homeowners know neither the identity of the party seeking to foreclose on them nor whether the legal requirements regarding transfers of ownership, a pre-requisite to a foreclosure, have been satisfied. Any electronic registration system must be implemented in a manner that preserves the approach required under law and affords full transparency to homeowners and the American public rather than being used as a means to circumvent it.

RESPONSE TO WRITTEN QUESTIONS OF CHAIRMAN MENENDEZ FROM DAVID C. HOLLAND

Q.1. If consultants are only reviewing borrowers for the items they check on the letter, then why aren't borrowers informed of that important fact in the letter?

A.1. Based on Rust's role in this process—specifically, as the firm which printed and mailed letters, but not the authors of their content—I do not believe I am the appropriate person to answer this question.

Q.2. What information obtained from borrowers will the consultants or Rust share with the servicers? This has Fair Debt Collection Practice Act implications, and there should be clear and public guidelines on this. Homeowners are more likely to trust the process if their personal information is not shared with the servicer (counselors have already had homeowners contact them who said that the potential use of information by the servicer is one reason why they don't want to return the form).

A.2. Rust follows a process with respect to handling and sharing of data which was agreed to by the Independent Consultants; Servicers; OCC; and the FRB. This process is to make all information sent to Rust available to both the appropriate servicer and its Independent Consultant.

Q.3. Testimony indicated that only 5 percent of mailings have been returned undeliverable, and that seems like a surprising statistic considering how many people who are foreclosed on move multiple times afterward. What explains that low rate of returns? Is it possible the letters are still sitting in unused mailboxes without being returned as undeliverable? Is there any in-person outreach being done to reach borrowers?

A.3. Rust, based on standard notification processes and agreed-upon processes for this engagement, conducted a number of steps prior to mailing with the intention of maximizing delivery rates. For example, when possible, we ran addresses through the National Change of Address service and, performed "skip-tracing." Further, the last-known addresses were relatively recent, only going back to approximately 2009; in the context of our business, this is relatively recent information.

It is noteworthy that it takes time for undeliverable mail to be returned; having continued to drop new mailings and knowing that mail will continue to be returned as it works its way through the U.S. Postal Service, the rates will change. Current statistics (as of Jan. 10, 2012) are that 414,317 total Notices have been returned as undeliverable (as compared to 4,339,191 Notices mailed), for approximately 9.5 percent.

With respect to whether letters could be unopened in unused mailboxes, we cannot comment with any authority: we can only confirm what is not received (based upon it coming back as undeliverable), not what is received, or (if received) what may be opened, read, *etc.*

Q.4. What has the borrower response rate been so far among the borrowers who have been contacted? What percentage have already returned their completed forms?

A.4. As of Jan. 10, 2012, 61,890 complaint forms have been received, as compared to 4,339,191 Notices having been mailed to borrowers, for approximately 1.4 percent. Notices were mailed in waves from Nov. 1, 2011, through Dec. 30, 2011. The complaint filing deadline is April 30, 2012.

Q.5. Shouldn't people be able to go to a Web site to get the form they need rather than relying on mailings alone?

A.5. In this respect, Rust is carrying out the program as agreed upon by the consortium. Their agreement in this case was to mail out bar-coded forms tied to specific database records as opposed to generic, Web-generated forms.

Q.6. Can the Web site be immediately redesigned to look more official, but also easier for borrowers to understand? It is currently so primitively done that it looks like a scam.

A.6. The Web site was created to match the design as requested by the consortium. We can make changes as requested.

Q.7. How will the borrowers who lost their homes to foreclosure or who have relocated be contacted? Can you commit to consulting with a wide variety of homeowner advocates including housing counselors and attorneys to gather any homeowner contact information from them?

A.7. Rust will carry out efforts according to the agreement of the consortium to contact borrowers, including working with whatever groups are identified as appropriate. As is typical in this type of effort (such as with class action settlements or other outreach programs), a media notice program is intended to reach borrowers currently unreachable by mail for whatever reason. The schedule for the media notice program, currently scheduled to begin in mid-January and aimed toward national and regional audiences in English and Spanish, is attached.

Q.8. What provisions are being made for outreach, materials (including required forms), and assistance to be provided in languages other than English? I've heard concerns that the way the outreach is being conducted may violate the Fair Housing Act. How will you ensure that all outreach materials comply with Limited English Proficiency Executive Order 166?

A.8. In this respect, Rust is carrying out the program as agreed upon by the consortium.

Q.9. The Spanish messages on the mailed claim forms and proposed print ads give unclear directions. Do call centers have representatives who are capable of taking calls in Spanish? Will Spanish-speaking borrowers be required to obtain their own independent interpreters in order to navigate the process?

A.9. Yes, our contact center includes Spanish-speaking customer service representatives (CSRs) who can respond to callers' questions to the same level of detail as our English-language CSRs, as all representatives follow approved, scripted questions and answers.

Q.10. Will Rust provide a 1–800 number for translation of forms and other guidelines?

A.10. Rust will facilitate whatever the consortium decides with respect to this. We have coordinated with the servicers to offer translation services via the existing toll-free number. If no CSR on staff can field questions in the language being requested, we will engage a third-party translator via a three-way call to resolve the call.

Q.11. Will outreach and print ads be done through Spanish-language media in select markets?

A.11. Yes, please see the attached media schedule for specific publications.

Q.12. Will you and the entire working group of independent consultants commit to having a regular series of ongoing meetings with a broad cross-section of housing counselors and legal advocates who are assisting borrowers prior to making major decisions about how these reviews will be conducted? For example, housing counselors may have forwarding information for the millions of borrowers who have moved, so why aren't they being consulted to get that info rather than just run skip traces? Why is their deep store of knowledge of problems that most borrowers have had not informing the review process? The OCC has stated in a post-hearing letter to me that they encourage you to engage in such communications as long as they do not reveal bank-specific information.

A.12. Rust will commit to participating in whatever meetings are identified as useful to the administration of this project, as agreed upon by the consortium.

Independent Mortgage Foreclosure Borrower Outreach
Media Schedule

Market(s)	Publication	In-market Timing
***** English *****		
National	Jet (2 wks in market)	1/16 - 2/12
National	Parade (2 insertions)	1/29, 2/5
National	People (2 wks in market)	1/27 - 2/9
National	TV Guide (2 wks in market)	1/19 - 2/1
National	USA Weekend (2 insertions)	1/29, 2/5
***** Spanish (Hispanic) *****		
Phoenix-Mesa, AZ	Prensa Hispana	1/26 - 2/8
Los Angeles, CA	La Opinion (2 insertions)	1/26, 2/2
Modesto, CA	Vida en el Valle (2 wks in market)	1/26 - 2/8
Oakland-San Francisco, CA	El Mensajero	1/29 - 2/11
Riverside-San Bernardino, CA	La Prensa	1/27 - 2/9
Sacramento, CA	Vida en el Valle (2 wks in market)	1/26 - 2/8
San Diego, CA	Enlace	1/28 - 2/10
Stockton, CA	Vida en el Valle (2 wks in market)	1/25 - 2/7
Washington, DC	El Tiempo Latino (2 wks in market)	1/27 - 2/9
Fort Lauderdale, FL	El Sentinel	1/27 - 2/9
Jacksonville, FL	Hola Noticias	1/27 - 2/9
Miami, FL	Diario Las Americas (2 insertions)	1/26, 2/2
	El Nuevo Herald (2 insertions)	1/26, 2/2
Orlando, FL	El Sentinel	1/28 - 2/10
Tampa, FL	Centro Tampa (2 wks in market)	1/27 - 2/9
	Nuevo Siglo (2 wks in market)	1/26 - 2/8
West Palm-Boca Raton, FL	El Latino Semanal	1/27 - 2/9
Atlanta, GA	Mundo Hispanico	1/26 - 2/8
Chicago, IL	Fin de Semana (2 wks in market)	1/28 - 2/10
	Hoy (2 insertions)	1/26, 2/2
Detroit, MI	Latino Press	1/26 - 2/8
New York, NY	El Diario / La Prensa (2 insertions)	1/26, 2/2
Las Vegas, NV	El Tiempo (2 wks in market)	1/27 - 2/9
Philadelphia, PA	Al Dia	1/27 - 2/9
Dallas, TX	Al Dia (2 insertions)	1/25, 2/1
Houston, TX	La Voz de Houston	1/27 - 2/9

RESPONSE TO WRITTEN QUESTIONS OF SENATOR CORKER FROM DAVID C. HOLLAND

Q.1. Are we permanently scaring off investors by telling them that when they buy an American mortgage security they have to deal with not only Federal regulations but 50 State AGs? I talk to countless investors who are telling me they are "on strike," so to speak, and they will stay on strike until they have clarity over the rules for foreclosures and loss mitigation. Basically we are scaring away investors with these lawsuits, which seems to me to be a problem given that all of the evidence thus far suggests that these were homeowners who were not paying their mortgages. Would

anyone care to address this risk? Do any of you share these concerns?

A.1. I do not believe that Rust Consulting, as the firm engaged to administer certain aspects of the Consent Orders for the Independent Mortgage Foreclosure Borrower Outreach project, or that I, as the executive vice president overseeing Rust's work in these engagements, are qualified to respond to this question. Rust's role is that of managing the already agreed-upon project, including data management, notification, contact centers, mail processing, *etc.*

Q.2. Do we need a uniform PSA to govern loss mitigation? I have a bill that directs the FHFA to work with industry participants to craft a PSA that would give investors and homeowners clarity on the rules of the road for loan modifications and loss mitigation. Do you all think this is a worthwhile idea?

A.2. Please see the response to the first question, above.

Q.3. Do we need to codify into law, and regulate with clarity, proper registration of mortgages? Our bill calls for a new platform to serve as the source of electronic registration for mortgage ownership, which would be regulated by FHFA and overseen by the Congress. Would this be a helpful step in ensuring we have 21st century infrastructure to go along with a 21st century capital markets regime?

A.3. Please see the response to the first question, above.

RESPONSE TO WRITTEN QUESTION OF CHAIRMAN MENENDEZ FROM PAUL LEONARD

Q.1. As Senator Merkley suggested during the hearing, will banks voluntarily submit to a foreclosure review process in which homeowners or groups representing homeowners get to choose the third-party reviewers who will decide the outcomes?

How will servicers learn from the results of this review? How will they correct any patterns of mistakes they made so that they don't continue to make those mistakes in dealing with foreclosures going forward?

A.1. Mr. Chairman, as discussed during the hearing, the Independent Foreclosure Review (IFR) process is part of the consent orders signed by 14 major mortgage servicers and their Federal regulators. The IFR process is being closely monitored by the Office of the Comptroller (OCC) and the Federal Reserve Board. As part of the IFR, the consultants performing the independent reviews will make all recommendations on financial remediation or other remedies for homeowners who they have determined experienced financial injury resulting from errors by their mortgage servicer. The OCC required that engagement letters for the independent consultants contain specific language stipulating that consultants would take direction from the OCC and prohibited servicers from overseeing, directing or supervising any of the reviews. The servicers participating in the Independent Foreclosure Review are complying with all aspects of the review and will comply with the recommendations of the independent consultants. That process is underway.

The Independent Foreclosure Review contains two components for determining if homeowners were harmed by servicer errors. The first is the "look-back" review. The independent consultants are conducting a valid statistical sampling of borrower accounts, including a review of 100 percent of borrowers with certain characteristics—such as those who may have been eligible for protection under SCRA. The second is the outreach effort to more than four million borrowers to enable them to request a review if they believe they experienced financial harm as a result of servicer errors, misrepresentations or other deficiencies in the foreclosure process. The process and results of both of these components is being overseen by the Federal regulators.

In addition, servicers have been making changes to strengthen their servicing practices and systems, based on their internal efforts and on requirements from their regulators. These changes include: hiring additional servicing staff and increasing staff training; improving management information systems; establishing a single point of contact for at-risk borrowers; and procedures on the "dual track" issue to ensure there are safeguards in the loan modification and foreclosure processes. The servicers participating in the Independent Foreclosure Review have made and are continuing to make changes to strengthen their mortgage servicing systems.

RESPONSE TO WRITTEN QUESTION OF SENATOR REED FROM PAUL LEONARD

Q.1. According to economist Mark Zandi, we could put a floor on housing prices by facilitating an additional 600,000 loan modifications above and beyond those that would otherwise occur with HAMP and other loan modification programs. Is this something that the Housing Policy Council and its members could strive for?

A.1. The members of the Housing Policy Council and other mortgage servicers continue to work hard to provide loan modifications and other home ownership preservation solutions for at-risk homeowners whenever possible. The latest industry data on loan modifications reported by the Hope Now Alliance shows that servicers completed 969,000 loan modifications in the first 11 months of 2011 and more than five million loan modifications since 2007. Hope Now data indicates that loan modifications continue to exceed foreclosure sales in a very difficult economic environment. Loan modifications are guided in large part by investor requirements. Lender/servicers can do additional types of modifications for loans they hold on their own books, but major expansion of loan modifications beyond those governed by HAMP and GSE guidelines would require additional guidance by the GSEs, which are currently the largest owner/investors of mortgages.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR CORKER FROM PAUL LEONARD

Q.1. Are we permanently scaring off investors by telling them that when they buy an American mortgage security they have to deal with not only Federal regulations but 50 State AGs? I talk to countless investors who are telling me they are "on strike," so to

speak, and they will stay on strike until they have clarity over the rules for foreclosures and loss mitigation. Basically we are scaring away investors with these lawsuits, which seems to me to be a problem given that all of the evidence thus far suggests that these were homeowners who were not paying their mortgages. Would anyone care to address this risk? Do any of you share these concerns?

A.1. It is true that more certainty regarding mortgage litigation and regulation at both the Federal and State level would allow investors to price the risk for investing in mortgages. In addition to investor reluctance, another serious problem is an "issuer strike"—issuers of MBS are reluctant to reenter the market. Issuers are facing the implementation of a variety of new regulations such as the Qualified Residential Mortgage (QRM) regulation, many of which have yet to be finalized. This is generating both uncertainty and compliance challenges for issuers. Private issuers also find it difficult to compete with the GSEs, given the current pricing structure for the securities they issue. The Housing Policy Council supports efforts to begin the process to reform the secondary mortgage market and ultimately replace the GSEs with a system that is based primarily on private capital and a clear, defined role for a Government guarantee that is defined and protects the taxpayers, while allowing consumers to have access to sound products like the 30-year fixed-rate mortgage.

Q.2. Do we need a uniform PSA to govern loss mitigation? I have a bill that directs the FHFA to work with industry participants to craft a PSA that would give investors and homeowners clarity on the rules of the road for loan modifications and loss mitigation. Do you all think this is a worthwhile idea?

A.2. Standardization is a hallmark of GSE securitizations. However, one of the strengths of the private label market is the ability of that market to develop unique pools of mortgages. As this market restarts, we believe the participants should have some flexibility in designing alternative terms and structures. Possibly some general "principles" would be useful rather than a mandatory PSA. Uniform loss mitigation efforts should also be developed in way that enables them to be implemented by all types of servicers—small, medium and large.

Q.3. Do we need to codify into law, and regulate with clarity, proper registration of mortgages? Our bill calls for a new platform to serve as the source of electronic registration for mortgage ownership, which would be regulated by FHFA and overseen by the Congress. Would this be a helpful step in ensuring we have 21st century infrastructure to go along with a 21st century capital markets regime?

A.3. The Housing Policy Council does not have a formal position on additional legislative action on the registration of mortgages at this time, but some factors that must be kept in mind include privacy concerns for individuals in the registration of mortgages, as well as an evaluation of the role and performance of MERS. The Housing Policy Council looks forward to working with Senator Corker on steps to insure the proper functioning of the secondary mortgage market in the future.

RESPONSE TO WRITTEN QUESTIONS OF CHAIRMAN MENENDEZ FROM ANTHONY B. SANDERS

Q.1. Your testimony stated that you have no reason to believe that the third-party consultants will shape their findings to favor the banks. Isn't it at least plausible that it's a conflict of interest for the servicer to choose its own reviewer when that reviewer has taken or is still taking millions of dollars in contracts from that same servicer? I think most neutral observers would say that doesn't pass the sniff test. It's essentially like a defendant being allowed to choose their own jury where the defendant knows the jury and has done business with or still has business with that jury.

A.1. While it seemingly doesn't pass the sniff test, one must remember that every watchdog group (both governmental and private sector) is watching the servicers (and third-party consultants) like hawks. Not only are there layer after layer of investigation units at Treasury, OCC, HUD, The Fed, FDIC, *etc.,* watching the servicers, you have private sector watchdog groups and attorneys looking to pounce on any perceivable wrong (even if it is just a difference of opinion). So there are enough eyes on the servicers already.

Q.2. You cite statistics on the potential cost of the reviews, but don't those costs depend heavily on the borrower response rates? If only 1 percent of borrowers respond, how much would costs be? And what is your source for the statistic about the cost of each review?

A.2. To be sure, the cost of foreclosure review ultimately depends on the number of borrowers that respond. Having said that, each of the lenders and servicers in question have expended fixed costs in the effort to ramp up for the foreclosure review. So even if no borrowers respond, the foreclosure review is still quite costly. My source of the information was from phone interviews with several servicing companies.

Q.3. Recent estimates from the Consumer Financial Protection Bureau suggest that mortgage servicers may have "saved" more than $20 billion through under-investment in proper servicing during the crisis. Do you have any estimate of the amount of money "saved" by servicers, to date, by failing to properly service residential mortgages?

A.3. I do not have any insights into whether servicers under-invested in proper servicing during the crisis. But I will say that defaults were so low prior to 2007 that servicers had slimmed-down staff. The gearing-up for the avalanche of defaults and foreclosures did result in more servicing infrastructure, which will have to be downsized again as defaults begin to decline. So, the CFPB is suggesting that they knew the optimal size of investment in mortgage servicing which is a silly proposition. Remember, the biggest mortgage buyers and insurance companies in the United States are Fannie Mae and Freddie Mac and they weren't concerned until after housing prices declined 40 percent. Hindsight is always 20/20.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR CORKER FROM ANTHONY B. SANDERS

Q.1. Are we permanently scaring off investors by telling them that when they buy an American mortgage security they have to deal with not only Federal regulations but 50 State AGs? I talk to countless investors who are telling me they are "on strike," so to speak, and they will stay on strike until they have clarity over the rules for foreclosures and loss mitigation. Basically we are scaring away investors with these lawsuits, which seems to me to be a problem given that all of the evidence thus far suggests that these were homeowners who were not paying their mortgages. Would anyone care to address this risk? Do any of you share these concerns?

A.1. I share these concerns and others. Not only are the lawsuits scaring away investors, but the constant drone of additional bureaus enforcement units is very frightening. Particularly since the AGs and Obama administration ignore the root causes of the housing and credit bubble (the Clinton administration's National Homeownership Strategy (see *http://confoundedinterest.wordpress.com/2012/01/26/krugmans-misleading-tale-of-two-bubbles-a-closer-look-at-the-data/*) but rather investigate and punish any bank that went along with the NHS. The rest of the world is looking at us with great confusion and fear since Government intervention in housing and financial markets is escalating at both the State and Federal levels.

Q.2. Do we need a uniform PSA to govern loss mitigation? I have a bill that directs the FHFA to work with industry participants to craft a PSA that would give investors and homeowners clarity on the rules of the road for loan modifications and loss mitigation. Do you all think this is a worthwhile idea?

A.2. I think that developing a standardized PSA to govern loss mitigation is a good idea since it would clarify rules in general, particularly for investors. But since loan modifications are very specific to the borrower, I must warn that broad-based rules governing who should receive loan modifications would ultimately back fire (see HAMP for a model of how NOT to encourage loan modifications). The real solution is to back away from Government stimulus of the housing market and not create further bubbles (see previous answer). Clinton's "Who let the dogs out" solution to unleash Fannie Mae and Freddie Mac turned out to be dreadful policy.

Also, remember that Fannie Mae and Freddie Mac developed the Uniform Mortgage Contract. That did not prevent Fannie Mae and Freddie Mac from rolling the dice on mortgages. My point is that you can try to regulate markets, but they often have a mind of their own.

Q.3. Do we need to codify into law, and regulate with clarity, proper registration of mortgages? Our bill calls for a new platform to serve as the source of electronic registration for mortgage ownership, which would be regulated by FHFA and overseen by the Congress. Would this be a helpful step in ensuring we have 21st century infrastructure to go along with a 21st century capital markets regime?

A.3. To be sure, a national registration process for mortgage ownership would be a good step forward. However, as long as the Federal Government continues to subsidize mortgage borrowing and the Federal Reserve attempts to stimulate the housing market through low interest rates, these problems of a housing bubble and burst will surface again. But have a national registration system updates the system to the 21st century. The problem is that housing policy is still stuck in the FDR years.

RESPONSE TO WRITTEN QUESTIONS OF CHAIRMAN MENENDEZ FROM ANN M. KENYON

Q.1. What procedures are being established for both the foreclosure reviews and the remediation process to ensure uniformity so that borrowers get the same treatment no matter which servicers or consultant they have?

A.1. As discussed in my testimony, we are subject to the monitoring, oversight, and direction of the OCC. Our procedures for conducting the independent review have been approved by the OCC, and, as I indicated in my response to Senator Merkley during the hearing, the OCC currently is considering the remediation construct for use by the independent consultants in conducting the review. Additionally, Ms. Williams stated in her testimony and in response to Senator Merkley that the OCC is working to ensure that this remediation construct is consistent across servicers. Finally, as stated in my testimony, we and other independent consultants "have been and are meeting with the OCC regularly to keep OCC officials apprised of the details of our approach and progress."

Q.2. Is it true that the results of the reviews will be shared with banks for comment prior to release, but not with homeowners, who will have no opportunity to comment prior to release? I would urge you to give homeowners equal opportunity to comment prior to release. It is bad enough that there are deep concerns about the true independence of the reviewers without even further biasing the process by allowing only one side to comment on and influence the outcomes?

A.2. Pursuant to the Consent Order, Deloitte & Touche LLP ("Deloitte") will draft a report containing the results of the independent review and, pursuant to the engagement letter approved by the OCC, submit it to the servicer for its comment. Deloitte, however, as independent consultant, has the final responsibility for the report's content. Consistent with the results of the independent review, Deloitte will exercise its own professional judgment and conclude as to what extent to accept or reject any suggested comments received from the servicer. As we are committed to transparency, should our findings and the servicer's views differ, such differences will be disclosed in the report.

Q.3. What steps will the consultants take to ensure that a foreclosure does not happen while a review is underway? How will the consultants know when a foreclosure sale is imminent such that they should halt the foreclosure and/or provide a faster review?

A.3. As Ms. Williams stated in her testimony, the OCC will "provide direction on minimum criteria" for review of files subject to

imminent foreclosure. We will conduct "prioritized review[s]" of those files consistent with those instructions, and the servicer also will review those files concurrently with us.

Q.4. I was very disturbed by the testimony indicating that if the consultants wish to contact or speak directly with borrowers, they are expected to contact the servicer first. How is it even remotely appropriate for the consultants, who are supposed to maintain independence at all times, to have to notify or get permission from the banks to contact borrowers? Will the OCC change its directives so that consultants do not have to either notify or get the permission of the banks to directly contact borrowers? For consultants to evaluate homeowner claims fairly requires open and direct communication between the consultants and homeowners and their advocates and should never be deterred by the servicer as an intermediary between them.

A.4. We are not required to receive permission from the servicer to direct the servicer to request any additional necessary information from a borrower. As Mr. Alt indicated during questioning, and as I agreed, should any additional borrower information be necessary during the review process, we have the power to "direct the servicer to request that information from the homeowner, or former homeowner."

Q.5. Is there a protocol requiring the consultants to reach out to homeowner advocates when there is evidence in the file that they were involved? Is there a protocol about how the reviewers will respond to inquiries from parties authorized on behalf of borrowers? If there are protocols, please describe them. If there are not protocols, I respectfully ask that you establish them.

A.5. As discussed in response to Question 4, above, we will direct the servicer to contact homeowners should any additional information regarding their file be required during the course of the review. Inquiries and complaints received from borrowers or their advocates as part of the Borrower Outreach Program are processed by the third-party Claim Intake Firm, Rust Consulting, and any documentation received by Rust, regardless of source, is forwarded to us. Finally, we are mindful of our instructions from the OCC (which you reference in Question 10 below) with respect to third-party communications about our work. To that end, we participated in a meeting with all the independent consultants and representatives from selected advocacy groups, facilitated by the OCC and the Federal Reserve Board, on January 5, 2012. It is my view that all participants found the meeting helpful.

Q.6. Can you commit to contacting homeowners or their advocates if pertinent information is missing? It is tremendously important that the reviews not be conducted on "submitted documents" alone, since we know that servicers have lost paperwork and servicer files may not be complete, and that homeowners who don't have a counselor or attorney to guide them through the process don't really know what proof they need to send in.

A.6. As discussed in response to Questions 4 and 5, above, we are not required to conduct the independent review on the basis of "'submitted documents alone." In some instances, our procedures

were specifically crafted to take into account assertions of missing paperwork. For the Borrower Outreach Program, we will direct servicers to contact homeowners should additional information regarding their file be required during the course of the review of their complaint.

Additionally, in an effort to make the process easier, there is no requirement for the borrower to submit any documentation. We would welcome any and all documentation the borrower would like to send, but their request for a review will be addressed as long as the eligibility requirements mandated in the Consent Order are met. Also, please note that question 13 on the form allows for comments to be written in, so borrowers are not restricted to answering the questions posed in questions 1–12.

Q.7. What experience requirements are mandated by the OCC for foreclosure file reviewers? How long is the mandatory training program for them? This strikes me as something that can't be learned in a 2- or 3-week training program, but would take years of experience. It seems to me that you really need lawyers reviewing these files on such complicated legal questions, but given some of the questionable job ads that have appeared, I question the qualifications of some of those being hired to do these reviews and make decisions that will have profound impacts on the lives of struggling families.

A.7. As I indicated in response to the Chairman's question at the hearing, Deloitte has not hired externally for this independent review. Within our Firm, we generally identified people with "prior mortgage banking experience, experience in controls and procedures work," and "familiarity with financial institutions and processes as well as . . . dealing with financial assets." The foreclosure file reviewers in our teams will undergo 3 weeks of rigorous training regarding our procedures approved by the OCC, and their work will be reviewed by managers and senior managers. The reviews also will be subject to our own internal quality control procedures, and the entire process will be overseen by a team of partners. Also, as outlined in our engagement letter, we are guided in our work by Independent Counsel, on whom we rely for the sufficiency of all matters requiring legal interpretation.

Q.8. If consultants are only reviewing borrowers for the items they check on the letter, then why aren't borrowers informed of that important fact in the letter?

A.8. As Mr. Leonard and Mr. Alt indicated at the hearing, the form sent to borrowers as part of the outreach program reflects a collaborative process between the servicers, independent consultants, and the regulators. The form was submitted to the OCC and Federal Reserve and approved by them. Further, as indicated in Ms. Williams' testimony, there is a portion of the form letter sent to borrowers as part of the outreach program "where a borrower can tell their story." According to Ms. Williams, 78 percent of the claim forms submitted by the time of the hearing utilized this "other" category. In her words, the review "process . . . contemplate[s] that there is the opportunity and the need for the independent consultants to consider the facts that are before them and take those into account."

Finally, as described in our engagement letter, we are not reviewing submitted complaints for those items only noted on the form. Complaints that are eligible for review but contain limited or inconsistent information will be given a full review for all items covered by Article VII of the OCC Consent Order.

Q.9. What information obtained from borrowers will the consultants or Rust share with the servicers? This has Fair Debt Collection Practice Act implications, and there should be clear and public guidelines on this. Homeowners are more likely to trust the process if their personal information is not shared with the servicer (counselors have already had homeowners contact them who said that the potential use of information by the servicer is one reason why they don't want to return the form).

A.9. Consistent with the terms of the Consent Order with the OCC and as approved by the OCC, our engagement contemplates that all outreach efforts and claim intake efforts will be handled by the third-party Claim Intake Firm, Rust Consulting. Rust and the servicer are expected to forward all complaints to us, along with relevant documents and findings related to the complaint

Q.10. Will you and the entire working group of independent consultants commit to having a regular series of ongoing meetings with a broad cross-section of housing counselors and legal advocates who are assisting borrowers prior to making major decisions about how these reviews will be conducted? For example, housing counselors may have forwarding information for the millions of borrowers who have moved, so why aren't they being consulted to get that info rather than just run skip traces? Why is their deep store of knowledge of problems that most borrowers have had not informing the review process? The OCC has stated in a post-hearing letter to me that they encourage you to engage in such communications as long as they do not reveal bank-specific information.

A.10. We are in receipt of guidance from the OCC with respect to such communications. As a public accounting firm, we have professional standards with which we must adhere, and those have previously been provided to Members of the Subcommittee's staff. Nevertheless, we are mindful that there are many parties interested in our results and have worked, and will continue to work, toward facilitating open communication. To that end, as indicated in our response to Question 5, we participated in a meeting with all the other independent consultants and representatives of selected housing/legal advocates, facilitated by the OCC and the Federal Reserve Board, on January 5, 2012.

Q.11. Can you swear that any other work or conflicts of interest between Deloitte and JP Morgan Chase will not affect the foreclosure reviews in any way? What disciplinary steps will you take against your employees if you find that they are performing the reviews in a way that benefits the banks instead of the public interest as directed by the regulators? What steps will you take to directly communicate that possibility of discipline to all your employees?

A.11. As I indicated in my response to the Chairman's question at the hearing, Deloitte has in place a specific process designed to ad-

dress conflicts of interest with respect to this engagement or indeed with any matters in this subject area. Based on this process, nothing has come to my attention that, in my judgment, would impair our ability to objectively serve on the engagement. Again, as I stated in the hearing, we are extremely "mindful of our mandate to maintain independence in this review," and will take corrective measures to the extent we believe in our judgment that any of our employees are not performing the review appropriately. To this end, any member of the engagement who is determined to be performing his or her work inappropriately as you describe will be removed from the engagement, the work re-performed, and the situation communicated to the regulators. In addition, since the hearing, the written testimony of Ms. Cohen as well as my own has become mandatory reading and incorporated into our training process.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR CORKER FROM ANN M. KENYON

Q.1. Are we permanently scaring off investors by telling them that when they buy an American mortgage security they have to deal with not only Federal regulations but 50 State AGs? I talk to countless investors who are telling me they are "on strike," so to speak, and they will stay on strike until they have clarity over the rules for foreclosures and loss mitigation. Basically we are scaring away investors with these lawsuits, which seems to me to be a problem given that all of the evidence thus far suggests that these were homeowners who were not paying their mortgages. Would anyone care to address this risk? Do any of you share these concerns?

A.1. As I described in my testimony offered at the December 13, 2011 hearing, our mandate, pursuant to the Consent Order with the OCC, is to conduct "an independent review of certain residential foreclosure actions regarding individual borrowers with respect to [the servicer's] mortgage servicing portfolio." As the scope of my work is thus limited, I do not have an opinion regarding investors' responses to numerous State and Federal regulations.

Q.2. Do we need a uniform PSA to govern loss mitigation? I have a bill that directs the FHFA to work with industry participants to craft a PSA that would give investors and homeowners clarity on the rules of the road for loan modifications and loss mitigation. Do you all think this is a worthwhile idea?

A.2. As indicated in my response to Question 1 above, our mandate is limited to conducting an independent review of certain foreclosures in 2009 and 2010. Pursuant to the Consent Order, the independent review will consider, among other things, whether "various loss mitigation programs were handled appropriately." Should our review determine that borrowers suffered financial harm due to deficiencies in loss mitigation programs, we will recommend possible remediation activity.

Q.3. Do we need to codify into law, and regulate with clarity, proper registration of mortgages? Our bill calls for a new platform to serve as the source of electronic registration for mortgage ownership, which would be regulated by FHFA and overseen by the Con-

gress. Would this be a helpful step in ensuring we have 21st century infrastructure to go along with a 21st century capital markets regime?

A.3. As indicated in my response to Question 2, above, it is beyond the scope of our work to offer recommendations regarding current or future legislation relating to the regulation of mortgage foreclosure practices or the mortgage service industry.

RESPONSE TO WRITTEN QUESTIONS OF CHAIRMAN MENENDEZ FROM KONRAD ALT

Q.1. What procedures are being established for both the foreclosure reviews and the remediation process to ensure uniformity so that borrowers get the same treatment no matter which servicers or consultant they have?

A.1. Consistent treatment of similarly situated borrowers, without regard to which servicer was involved in the foreclosure or which independent consultant conducts the review, is important to the success of these foreclosure reviews. With this objective in mind, the independent consultants and the agencies have worked hard to develop and support consistent procedures, including in regard to the solicitation and intake of complaints, the definition of financial injury, and the determination of appropriate remediation.

The nature of the process is such that independent consultants can often identify needs for consistency, escalate those needs to the agencies, and discuss potential solutions with them. But the independent consultants have neither the authority to establish uniform or substantively equivalent procedures, nor—because each consultant has detailed understanding only of its own procedures—the ability to validate that the procedures in use in different reviews are in fact uniform or substantively equivalent. As independent consultants, therefore, we seek to promote consistency primarily by adhering closely to the guidance we receive from the agencies and by escalating to the agencies whatever opportunities we can identify to strengthen that guidance or bring uniformity to other key areas through the development and publication of additional guidance.

Q.2. Is it true that the results of the reviews will be shared with banks for comment prior to release, but not with homeowners, who will have no opportunity to comment prior to release? I would urge you to give homeowners equal opportunity to comment prior to release. It is bad enough that there are deep concerns about the true independence of the reviewers without even further biasing the process by allowing only one side to comment on and influence the outcomes.

A.2. My colleagues and I agree that maintaining our independence is vitally important to the success of these reviews. In that regard, our engagement letters make clear that we alone are responsible for the final determinations we reach with regard to each file we review. We make the servicers we work with aware of those determinations but we do not invite servicers to comment on them.

While we have not designed our process to give servicers an opportunity to comment on our final determinations, servicers can

often gain an understanding of our preliminary views as a by-product of our fact-finding process. Our ability to reach unbiased conclusions depends entirely on gaining a complete understanding of the facts pertaining to each file we review. We gain that understanding partly by reviewing the file materials provided to us, and partly by following up with the servicer when those materials suggest that we may be missing other relevant documents or data.

All of these activities are transparent to and closely monitored by the regulators and intended to ensure that we reach final determinations based on a complete factual understanding. We would view any "lobbying" by the servicers we work with as an effort to interfere with our independence that would require escalation to the agencies. We believe the servicers understand our view in this regard.

Q.3. What steps will the consultants take to ensure that a foreclosure does not happen while a review is underway? How will the consultants know when a foreclosure sale is imminent such that they should halt the foreclosure and/or provide a faster review?

A.3. We recognize how important it is to identify and correct errors in the foreclosure process in time to prevent wrongful foreclosures from occurring. We have established dedicated review teams, guided by more urgent timelines, to ensure that we promptly review every file we receive in which the borrower faces an imminent foreclosure sale. If we identify a harmful error in the course of our review, we promptly notify the servicer. After consideration of our findings, the decision whether to suspend a sale date rests with the servicer.

In addition, we have worked with the agencies and the servicers to develop consistent procedures for identifying and prioritizing files for review where foreclosure is imminent, for the use of all independent consultants and servicers. We understand that the agencies are finalizing these procedures, and anticipate that they will be published as guidance to the independent consultants in the near future.

Q.4. I was very disturbed by the testimony indicating that if the consultants wish to contact or speak directly with borrowers, they are expected to contact the servicer first. How is it even remotely appropriate for the consultants, who are supposed to maintain independence at all times, to have to notify or get permission from the banks to contact borrowers? Will the OCC change its directives so that consultants do not have to either notify or get the permission of the banks to directly contact borrowers? For consultants to evaluate homeowner claims fairly requires open and direct communication between the consultants and homeowners and their advocates and should never be deterred by the servicer as an intermediary between them.

A.4. My testimony should not have left the impression that we must go through the servicers we work with in order to contact borrowers. We understand ourselves to be free to contact borrowers directly.

The judgment we have thus far made not to reach out to borrowers directly is not immutable, and we continue to discuss with other independent consultants and with the agencies whether, how,

and under what circumstances independent consultants should engage with borrowers directly. Should those discussions yield an OCC determination that the independent consultants should assume responsibility for contacting borrowers directly, we would abide by that determination to the best of our professional ability.

Q.5. Is there a protocol requiring the consultants to reach out to homeowner advocates when there is evidence in the file that they were involved? Is there a protocol about how the reviewers will respond to inquiries from parties authorized on behalf of borrowers? If there are protocols, please describe them. If there are not protocols, I respectfully ask that you establish them.

A.5. No such protocols exist, and, as you know from my testimony before the Subcommittee, I share the view that they are potentially beneficial. While a decision to establish protocols binding on all of the independent consultants would need to come from the agencies, the independent consultants have begun to discuss this question, among others, with a number of advocacy groups and with the agencies. I expect these discussions to continue, and can promise that my colleagues and I will participate in them actively, in the hope that we can identify a constructive mechanism to supplement our own knowledge of the files within the scope of our review with information and expertise in the possession of advocates who may have additional knowledge.

Q.6. Can you commit to contacting homeowners or their advocates if pertinent information is missing? It is tremendously important that the reviews not be conducted on "submitted documents" alone, since we know that servicers have lost paperwork and servicer files may not be complete, and that homeowners who don't have a counselor or attorney to guide them through the process don't really know what proof they need to send in.

A.6. In the first instance, it is the servicer's responsibility to provide us with the information necessary to complete our review. When notations or other information in the file make clear that the servicer has not met this responsibility—*i.e.,* that something important is missing—our first step is to direct the servicer to complete the file by providing whatever is missing. To meet that burden and satisfy our informational requirements, the servicer may need to reach out to any of several parties. These parties commonly include the local counsel engaged by the servicer to handle the foreclosure, but can potentially include borrowers or their advocates as well.

Unfortunately, it may not always be clear from the contents of the file that information is missing. For example, a file could seem complete even though it is in fact missing key documents that are in possession of the borrower or the borrower's advocate. Because it appears complete, however, such a file is unlikely to lead an independent consultant to seek additional information from anybody. While the borrower, in the course of requesting an independent review, can elect to provide us with supporting documentation, this possibility only partially mitigates the problem. The borrower could reasonably but incorrectly assume that the file under review includes documents that are, in fact, absent and unknown to the independent consultant.

In principle, we could address this issue by adopting the practice of reaching out to the borrower or the borrower's advocate routinely, on every file. In practice, however, this approach could create its own set of issues. In particular, because the number of files under review is very large, and because many borrowers have proven difficult to reach, requiring such outreach on every file could delay or preclude altogether the independent consultant's review of many files. In addition, the independent consultant may not be able to tell from the file whether an advocate worked with the borrower.

Despite these challenges, we are anxious to avoid drawing incorrect conclusions from incomplete files. We will continue to explore this problem with other independent consultants, the agencies, and borrower advocates in the hope of identifying good practical solutions. Should those discussions yield regulatory direction to change our current practices in this area, we will of course comply.

Q.7. What experience requirements are mandated by the OCC for foreclosure file reviewers? How long is the mandatory training program for them? This strikes me as something that can't be learned in a 2- or 3-week training program, but would take years of experience. It seems to me that you really need lawyers reviewing these files on such complicated legal questions, but given some of the questionable job ads that have appeared, I question the qualifications of some of those being hired to do these reviews and make decisions that will have profound impacts on the lives of struggling families.

A.7. The OCC has not mandated experience requirements for foreclosure reviewers in general. Instead, the agency required each project team to propose, as part of its draft engagement letters, how it would staff these engagements. The agency considered these proposals in the course of evaluating, commenting on, and, ultimately, approving our engagement letters for execution. This process yielded a variety of directions specific to individual engagements. Our executed engagement letters, accordingly, incorporate the results of this dialogue and describe the types of individuals we look for and the training we provide.

As I indicated in my testimony, these reviews require many types of expertise and levels of experience, and we have built our teams accordingly. No single job description is representative of the population of people we have hired to perform these reviews.

We agree that legal expertise is essential to the successful conduct of these reviews, but many of the determinations we need to make are not legal in nature and do not require assistance of counsel. For example, in most cases, we do not need a lawyer to determine whether a foreclosure sale occurred after the date of a bankruptcy filing, or whether an income computation was accurate, or whether a borrower was or was not on active duty as of a particular date. With the support of appropriate information systems and with oversight and quality control by experienced supervisors, we have found that appropriately selected and trained professionals can make determinations such as these reliably, without the benefit of legal education.

Even though many of the determinations we need to make are not legal in nature, my testimony should not have left the impression that we are performing these reviews without the benefit of legal expertise or resources. On the contrary, our teams include many lawyers and, in addition, each of our teams has retained independent counsel for any and all necessary legal interpretations. In addition, our teams include numerous subject matter experts, and we maintain strong quality control and quality assurance processes, staffed with highly experienced and dedicated personnel, to ensure that we adhere to the processes we have established and maintain a high standard of quality in our work.

Q.8. If consultants are only reviewing borrowers for the items they check on the letter, then why aren't borrowers informed of that important fact in the letter?

A.8. It is not the case that consultants will only review items checked by the borrowers. The form provides borrowers with an opportunity to convey, in the borrower's own words, the borrower's own view of what went wrong in the foreclosure process. Many of the borrowers who have responded thus far are taking advantage of this opportunity. We read their comments closely and use them, in addition to whatever boxes the borrower may have checked, to guide our review of the file. In addition, borrowers who submit a "generalized" complaint will receive a thorough file review. We deem complaints "generalized" under a variety of circumstances. For example, a complaint may be generalized because the borrower checked multiple items, checked no items at all, or provided written commentary conveying the belief that the entire foreclosure process was flawed.

More generally, the letter and associated form were designed to help guide independent consultants to the issues of greatest concern to the borrowers. The specific questions seek to direct the borrowers to the subject areas within the scope of the independent review, as set forth in the consent orders. In designing the letter and form, the hope was that, by zeroing in on issues of concern to the borrower, independent consultants would be able to identify and evaluate the most likely servicer errors more quickly, thereby facilitating prompt remediation to the borrower.

Q.9. What information obtained from borrowers will the consultants or Rust share with the servicers? This has Fair Debt Collection Practice Act implications, and there should be clear and public guidelines on this. Homeowners are more likely to trust the process if their personal information is not shared with the servicer (counselors have already had homeowners contact them who said that the potential use of information by the servicer is one reason why they don't want to return the form).

A.9. Currently, all information submitted by borrowers to Rust is shared with the servicers. This sharing is necessary to enable servicers to collect and assemble the file materials essential to the independent consultant's review, but it is not intended to support servicers in their ongoing or future collection activities. We endorse the view that clear and public guidelines in this area are desirable, and have both discussed the issue with the OCC and elevated it for discussion among the servicer consortium.

Q.10. Will you and the entire working group of independent consultants commit to having a regular series of ongoing meetings with a broad cross-section of housing counselors and legal advocates who are assisting borrowers prior to making major decisions about how these reviews will be conducted? For example, housing counselors may have forwarding information for the millions of borrowers who have moved, so why aren't they being consulted to get that info rather than just run skip traces? Why is their deep store of knowledge of problems that most borrowers have had not informing the review process? The OCC has stated in a post-hearing letter to me that they encourage you to engage in such communications as long as they do not reveal bank-specific information.

A.10. On January 5, I helped to organize and attended an initial meeting between a group of independent consultants and representatives of a number of advocacy groups, including the National Fair Housing Alliance, the National Consumer Law Center, Consumer Action, the Center for New York City Neighborhoods, the National Association of Consumer Advocates, and the Center for Responsible Lending. Representatives of both the OCC and the Federal Reserve Board of Governors also attended this meeting, for which the OCC graciously provided space at its offices in Washington, D.C. The National Fair Housing Alliance worked with other advocacy groups to organize an agenda and helped to lead the meeting.

My colleagues and I found this meeting useful and constructive. We agree that groups such as these have information and insights from which independent consultants can benefit. We welcome their contributions to this effort. We expect that there will be follow-up meetings, and we will gladly join them. While we cannot make commitments on behalf of other independent consultants, we will do what we can to make sure that other independent consultants are invited to such meetings.

Q.11. Can you swear that any other work or conflicts of interest between Promontory and Bank of America, PNC, and Wells Fargo will not affect the foreclosure reviews in any way? What disciplinary steps will you take against your employees if you find that they are performing the reviews in a way that benefits the banks instead of the public interest as directed by the regulators? What steps will you take to directly communicate that possibility of discipline to all your employees?

A.11. My colleagues and I are doing and will continue to do everything we can to perform these reviews in an independent and unbiased manner. We will find financial injury, or not, according to the facts presented by each file. We will be firm in our conclusions without regard to past, present or future work with Bank of America, PNC or Wells Fargo.

All employees hired for the foreclosure review receive mandatory training that clearly communicates the role of the independent consultant and the nature of the job, specifically including the objective of these reviews: to find borrowers who have suffered financial injury, so that they can receive appropriate remediation. We include a summary of the consent order in our analyst handbook, which we require all project staff to read prior to beginning review

work. We frequently remind project staff to err on the side of the borrower in making any close call, and reinforce in our staff meetings the importance of maintaining independence and performing to the best of our individual and collective abilities.

Our firm is committed to the highest standards of professionalism, which certainly include avoiding conflicts of interest and maintaining appropriate independence. We reinforce our standards, and the seriousness of our commitment to them, in numerous ways, including through our willingness to take disciplinary action, up to and including termination, when employees or contractors fail to meet our standards. We would strongly counsel and, if necessary, terminate any employee or contractor engaged in this review whose performance manifested an obvious pro-servicer bias, conflict of interest, lack of independence, or other violation of our standards. We will continue to reinforce our standards, and the potential consequences for those who fall short of them, in communicating with our employees and contractors, specifically including the workforce we have engaged to conduct the independent foreclosure reviews.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR CORKER FROM KONRAD ALT

Q.1. Are we permanently scaring off investors by telling them that when they buy an American mortgage security they have to deal with not only Federal regulations but 50 State AGs? I talk to countless investors who are telling me they are "on strike," so to speak, and they will stay on strike until they have clarity over the rules for foreclosures and loss mitigation. Basically we are scaring away investors with these lawsuits, which seems to me to be a problem given that all of the evidence thus far suggests that these were homeowners who were not paying their mortgages. Would anyone care to address this risk? Do any of you share these concerns?

A.1. These are important questions, but they are outside the scope of our firm's recent work as an independent consultant, and beyond my personal expertise. Unfortunately, therefore, I am unable to provide an informed or expert response.

Q.2. Do we need a uniform PSA to govern loss mitigation? I have a bill that directs the FHFA to work with industry participants to craft a PSA that would give investors and homeowners clarity on the rules of the road for loan modifications and loss mitigation. Do you all think this is a worthwhile idea?

A.2. The idea of a uniform PSA is certainly intriguing, but here, too, I feel that our recent experience as an independent consultant affords me no particular claim to insight or expertise.

Q.3. Do we need to codify into law, and regulate with clarity, proper registration of mortgages? Our bill calls for a new platform to serve as the source of electronic registration for mortgage ownership, which would be regulated by FHFA and overseen by the Congress. Would this be a helpful step in ensuring we have 21st century infrastructure to go along with a 21st century capital markets regime?

A.3. Undeniably, problems with mortgage registration rank high among the issues confronting the mortgage sector. As a general matter, my colleagues and I support efforts to modernize our mortgage registration system. We know, moreover, that the Federal banking agencies have already initiated such efforts, using their examination and enforcement resources. Unfortunately, we are not aware of the progress achieved through those efforts to date, and therefore do not have a view as to whether additional efforts, such as Federal legislation, would serve a constructive purpose at this time.

ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD

Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

December 2, 2011

Ms. Megan Von Wald, Allonhill, LLC
Ms. Elizabeth McCaul, Promontory Financial Group, LLC
Mr. Eric Mercer, PricewaterhouseCoopers LLP
Mr. Matthew Giacomini, Clayton Services, LLC
Mr. Christopher Sercy, Ernst & Young, LLP
Ms. Ann Kenyon, Deloitte & Touche, LLP
Mr. Bradley Massam, Ernst & Young, LLP
Mr. Paul Noring, Navigant Consulting, Inc.
Mr. Michael Joseph, Promontory Financial Group, LLC
Ms. Catherine Brown, Treliant Risk Advisors, LLC
Mr. Michael Stork, PricewaterhouseCoopers LLP
Mr. Konrad Alt, Promontory Financial Group, LLC

Subject: *Article VII – Independent Foreclosure Review Related Disclosures of Information*

Dear Independent Consultants:

As you are aware, there is a high level of public interest in the Article VII Foreclosure Reviews currently underway pursuant to the April 13, 2011 Consent Orders for which each of your respective firms have a role in serving as an independent consultant. The functions your respective firms are performing are essential to the financial remediation process required under the Consent Orders, and those Orders, in turn, are part of a larger set of governmental responses to crises in the mortgage and housing markets. In this unique context, external parties' understanding of and confidence in the integrity and effectiveness of the financial remediation processes your firms are conducting under the Orders is important. In an effort towards transparency of this process, the Office of the Comptroller of the Currency (OCC) recently published an Interim Report providing details on the foreclosure review and information about progress made by servicers on compliance with our Orders. The report was accompanied by redacted versions of the respective engagement letters.

Since the release of the engagement letters and the names of the consulting groups responsible for performing the independent reviews of borrower files and complaints, various parties, including public interest organizations and members of Congress, have expressed interest in having direct communications with the independent consultants to better understand the activities being performed as part of the foreclosure review. The OCC views effective communications with such parties as beneficial to the independent review. To that end, we believe certain clarifications, set forth below, are important.

As a general matter, non-public, institution-specific information and information relating to the foreclosure reviews and the OCC consent orders is confidential supervisory information subject to restrictions on disclosure under 12 C.F.R. Part 4. However, where the OCC has released information into the public domain, that information may be discussed. This would include the information contained in the recently released redacted engagement letters and in the OCC's Interim Report. Further, generic descriptions of how the foreclosures review process will operate, and answers to general operational questions that are not institution-specific, are also not precluded. On the other hand, bank specific information related to the reviews or implementation of remedial actions under the Orders that has not been previously publicly disclosed by the OCC remains subject to Part 4 protections and may not be disclosed. To the extent you assert there are legal or professional standards or requirements that impede the discussion of publicly available information contained in the engagement letters or generalized information about the reviews, please set forth in detail those requirements and explain why the servicer client could not provide a waiver, as part of the engagement arrangement, to any such requirements.

In view of the public interest in this process, we strongly encourage you, consistent with the principles above, to be responsive to initiatives by public interest organizations and Congress to obtain better understanding of the process. Establishment of constructive and mutually informative relationships with public interest organizations also offers the opportunity to develop additional avenues of outreach to borrowers who may qualify for an independent foreclosure review. Effective outreach will enable more borrowers who believe they have a legitimate claim for financial remediation to have their circumstances considered under the independent reviews conducted by your firms.

Sincerely,

Michael L. Brosnan
Senior Deputy Comptroller
Large Bank Supervision

Julie L. Williams
First Senior Deputy Comptroller
and Chief Counsel

Cc:

Theodore P. Janulis, Chief Executive Officer, Aurora Bank FSB
Charles F. Bowman, Special Advisor on Remediation Strategies
Bank of America Corporation
Sanjiv Das, Senior Vice President, Citibank, NA
Tom Hajda, SVP and General Counsel, Everbank
Stuart Alderoty, Senior Executive Vice President and General Counsel,
HSBC Bank USA, NA
Stephen M. Cutler, General Counsel, JP Morgan Chase Bank, NA

Duane Elmer, Chief Risk Officer, MetLife Bank, NA
Jules Vogel, Executive Vice President and General Counsel, OneWest Bank, FSB
Thomas K. Whitford, Vice Chairman, The PNC Financial Services Group
Richard Toomey, Executive Vice President and General Counsel, Sovereign Bank
Michael LaFontaine, Deputy Chief Risk Officer, U.S. Bancorp
Caryl Athanasiu, Executive Vice President and Chief Operational Risk Officer
Wells Fargo Bank, NA

Key Facts: Independent Foreclosure Review

- As part of consent orders issued in April 2011, federal regulators required servicers to engage independent firms to conduct a multi-faceted review of foreclosure actions in process in 2009 and 2010.

- As part of that program, the14 bank and thrift servicers covered by the enforcement actions will be mailing information to potentially eligible borrowers through the end of the year.

- The mailings provide information about how eligible borrowers can request a review of their foreclosure cases if they believe they suffered financial injury as a result of errors, misrepresentations, or other deficiencies in foreclosure proceedings related to their primary residence between January 1, 2009 and December 31, 2010.

- To be eligible, the mortgage must have been active in the foreclosure process between January 1, 2009, and December 31, 2010, the property securing the loan must have been the primary residence, and the mortgage must have been serviced by one of the following servicers:

• America's Servicing Company • Aurora Loan Services • Bank of America • Beneficial • Chase • Citibank • CitiFinancial • CitiMortgage	• Countrywide • EMC • Everbank/Everhome • First Horizon • GMAC Mortgage • HFC • HSBC • IndyMac Mortgage Services • Metlife Bank	• National City • PNC • Sovereign Bank • SunTrust Mortgage • U.S. Bank • Wachovia • Washington Mutual • Wells Fargo

- The servicers have established a Web site, www.IndependentForeclosureReview.com and a toll-free number (**1-888-952-9105**) to provide borrowers additional information. Assistance from the toll-free number is available Monday through Friday from 8 a.m. to 10 p.m. (ET) and Saturday from 8 a.m. to 5 p.m. (ET).

- Requests for review must be received by **April 30, 2012.**

- The OCC will monitor servicers and independent consultant throughout the process. The independent consultants are responsible for conducting the reviews.

For release at 2:30 p.m. EST
December 13, 2011

Statement of

Scott G. Alvarez

General Counsel

Board of Governors of the Federal Reserve System

Submitted to the Senate Committee on Banking, Housing, and Urban Affairs Subcommittee

On

Housing, Transportation, and Community Development

U.S. Senate

Washington, D.C.

December 13, 2011

by the Federal Reserve will conduct the Foreclosure Review; (c) establish, in connection with the Foreclosure Review, a process for the receipt and review of borrower claims and complaints (the "Borrower Outreach Program"); and (d) submit specific plans acceptable to the Federal Reserve designed to correct practices that resulted in servicer errors and to prevent future abuses in the loan modification and foreclosure processes. This statement also addresses the requirements in the Federal Reserve's enforcement actions that parent holding companies submit plans acceptable to the Federal Reserve to improve holding company oversight of residential mortgage loan servicing and foreclosure processing conducted by bank and nonbank subsidiaries.

The Foreclosure Review and Independent Consultants

The Federal Reserve's enforcement actions require the servicers to retain one or more independent consultants acceptable to the Federal Reserve to conduct the Foreclosure Review to determine whether borrowers suffered financial injury as a result of errors, misrepresentations, or other deficiencies in the foreclosure process. Where financial injury is found, the servicers must compensate the injured borrowers pursuant to a remediation plan that is acceptable to the Federal Reserve.

In determining the acceptability of consultants, the Federal Reserve closely scrutinized their independence. Importantly, the Federal Reserve reviewed whether the consultant currently provides or had previously provided advice to the banking organization regarding its foreclosure practices, opinions, or actions that may have contributed to the deficiencies identified by examiners during their reviews conducted from November 2010 to January 2011. This determination was made to ensure that the consultant would not review any action or opinion previously recommended by the consultant to the banking organization. We will continue to

oversee the Foreclosure Review process to make sure that the consultants who were accepted act independently.

The Federal Reserve orders require the servicers to review the files of borrowers whose primary residence was in the foreclosure process of the servicer in 2009 or 2010, whether or not the foreclosure was completed.

At this time, we are requiring the independent consultants to include in the review all files for particular categories of borrowers who we have determined present a significant risk of being financially injured in the foreclosure process. Any borrower who falls into any one of those categories must receive an independent foreclosure review. The categories for mandatory review include all mortgages in the mortgage foreclosure process in 2009 or 2010 involving members of the military who were covered by the Servicemembers Civil Relief Act. It also includes all borrowers who had previously filed complaints with the servicers about foreclosure actions that were pending during 2009 or 2010. High risk files involving borrowers in bankruptcy will also be reviewed. Other files outside of these categories must be reviewed on a sampling basis to detect if errors, misrepresentations, or deficiencies occurred. Going forward, we may determine that additional file reviews are appropriate.

The Borrower Outreach Program

The Federal Reserve's enforcement actions require that each banking organization with servicing operations supervised by the Federal Reserve implement, in connection with the Foreclosure Review, a process for the receipt and review of borrower claims and complaints. We view this Borrower Outreach Program and the submission by borrowers of requests for review as critical to ensuring that borrowers who suffered financial injury are identified and

appropriately compensated for financial injury they suffered as a result of errors, misrepresentations, or other deficiencies in the foreclosure process.

The Borrower Outreach Program was first announced on November 1, 2011, and is intended to make eligible borrowers aware of the opportunity they have to have their foreclosures independently reviewed as part of the Foreclosure Review. Borrowers are eligible to request that their files be reviewed if their primary residence was in the foreclosure process in 2009 or 2010, whether or not the foreclosure was completed. Borrowers are eligible to request a review even if they previously filed a complaint with their servicer about their foreclosure.

Information about the review process, including how to request a review as part of the Foreclosure Review, is being provided in mailings to borrowers who may be eligible for a review. The servicers initiated mailings on November 1 and have represented that they should be completed by the end of the year. In connection with those mailings, the servicers are required to take measures, such as skip tracing (collecting information about an individual from various sources to determine the individual's location), to identify borrowers who may have moved. The servicers also have established a toll-free number that borrowers can call and a website that borrowers can access to get more information about the review.[2] Additionally, servicers are required to conduct an advertising campaign to make borrowers aware of the opportunity to request reviews of their foreclosures as part of the Foreclosure Review. The Federal Reserve is overseeing the servicers it supervises to make sure they are effectively doing everything they can to find borrowers who are potentially eligible for the Foreclosure Review.

The Federal Reserve is working closely with the Office of the Comptroller of the Currency in overseeing the development and operation of the Borrower Outreach Program, and

[2] To apply for a review, individuals may call 888-952-9105, Monday through Friday from 8 a.m. to 10 p.m. (ET) and Saturday from 8 a.m. to 5 p.m. The servicers' website is www.IndependentForeclosureReview.com.

with the independent consultants, servicers, and community groups to increase awareness of this program and promote participation by borrowers. We emphasize that *any borrower whose primary residence was in the foreclosure process in 2009 or 2010, can have his or her file included in the Foreclosure Review simply by submitting a claim or complaint pursuant to that program.*

The Engagement Letters

The Federal Reserve's enforcement actions require the servicers to each submit an engagement letter to the Federal Reserve for approval that describes how the independent consultants retained by the servicer and approved by the Federal Reserve will conduct the Foreclosure Review. The Federal Reserve is nearing completion of its review and finalization of those engagement letters. Because our review of the letters contemplates more extensive criteria for conducting the Foreclosure Review than those that apply to the national bank servicers, finalization of the engagement letters has required more time to complete.

We believe that the actions taken by the Federal Reserve and the banking organizations it supervises to implement the enforcement actions should be accessible by the public to the maximum extent possible. To that end, we expect to disclose significant portions of the final engagement letters, consistent with the need to protect proprietary financial information and personal privacy.

The Action Plans

The Federal Reserve's enforcement actions require that each banking organization with servicing operations supervised by the Federal Reserve submit specific plans acceptable to the Federal Reserve designed to correct practices that resulted in servicer errors and prevent future

abuses in the loan modification and foreclosure process. Each servicer regulated by the Federal Reserve must, among other things, submit specific plans acceptable to the Federal Reserve that

- ensure there is adequate staff to carry out residential mortgage loan servicing, loss mitigation, and foreclosure activities, and conduct periodic reviews of the adequacy of staffing levels to ensure that levels remain adequate;
- improve training of staff involved in residential mortgage loan servicing, including by requiring that training be conducted at least annually;
- strengthen coordination of communications with borrowers throughout the loss mitigation and foreclosure processes by providing such borrowers the name of the person at the servicer who is their primary point of contact;
- require that the primary point of contact has access to current information and personnel sufficient to timely, accurately, and adequately inform the borrower about loss mitigation and foreclosure activities;
- address dual tracking by ensuring that foreclosures are not pursued once a mortgage has been approved for modification, unless repayments under the modified loan are not made;
- consider loan modification or other loss mitigation activities with respect to junior-lien loans owned by the servicer, where the servicer services the associated first-lien mortgage and becomes aware that the first-lien mortgage is delinquent or has been modified;
- establish robust controls and oversight over the activities of third-party vendors that provide to the servicers various residential mortgage loan servicing, loss

mitigation, or foreclosure-related support, including local counsel in foreclosure or bankruptcy proceedings; and

- strengthen programs to ensure compliance with state and federal laws regarding servicing, generally, and foreclosures, in particular.

In addition, the enforcement actions issued in April require the parent holding companies to submit plans acceptable to the Federal Reserve to improve holding company oversight of residential mortgage loan servicing and foreclosure processing conducted by bank and nonbank subsidiaries.

We continue to review and approve plans required by the Board's enforcement actions to ensure they meet the Federal Reserve's supervisory expectations, and we will be working to ensure that words are followed through with the required actions. Consistent with our approach with regard to the engagement letters, we expect to disclose significant portions of the documentation related to the final action plans, consistent with the need to protect proprietary financial information and personal privacy.

The Federal Reserve will continue to monitor, on an ongoing basis, the corrective measures that are being taken by the servicers and bank holding companies it supervises, as required by the orders. Additionally, each institution is required to submit quarterly reports to the Federal Reserve detailing the measures it has taken to comply with the enforcement action and the results and progress toward meeting those measures. The Federal Reserve will closely review the servicers' and bank holding companies' progress reports and will also conduct examinations to ensure that the plans are implemented as approved and that the changes are effective. The Federal Reserve will take appropriate supervisory action including a cease and

desist order or monetary penalties to address any inadequacies or violations of the enforcement actions.

As we have previously stated, the Federal Reserve believes monetary sanctions in these cases are appropriate and plans to announce monetary penalties. These monetary penalties will be in addition to the compensation provided to borrowers in the independent review process. The Federal Reserve continues to work with other federal and state agencies to resolve these matters.

Conclusion

The Federal Reserve takes seriously its responsibility to oversee the implementation and execution of the requirements of its April 2011 enforcement actions, including the Foreclosure Review and other requirements described above. We understand that implementing and executing those requirements effectively is critical to ensuring that the deficiencies identified by examiners during reviews conducted from November 2010 to January 2011 are corrected; that future abuses in the loan modification and foreclosure process are prevented; and that borrowers are compensated for financial injury they suffered as a result of errors, misrepresentations, or other deficiencies in the foreclosure process.

Thank you for the opportunity to submit this statement on the status of the Foreclosure Review process and other progress made in implementing the enforcement actions that the Federal Reserve issued in April 2011.